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No. 7243

United States Circuit Court of Appeals

For the Ninth Circuit.

THE FIRST NATIONAL BANK OF KELSO, WASHINGTON, a Corporation, by E. B. BENN, Its Receiver,

Appellant,

vs.

J. G. GRUVER, and THE AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

COUNSEL OF RECORD:

For Plaintiff and Appellant:

FISK & McCARTHY,
Attorneys at Law,
Longview, Washington.

For Defendants and Appellees:

CECIL HALLIN,
Attorney at Law,
Kelso, Washington.

J. E. STONE,
Attorney at Law,
Kelso, Washington.

JOHN H. DUNBAR,
Attorney General, State of Wash.,
Olympia, Washington.

LESTER T. PARKER,
Assistant Attorney General,
State of Washington,
Olympia, Washington.

In the United States District Court for the Western District of Washington, Southern Division.

No. 8261

THE FIRST NATIONAL BANK OF KELSO, WASHINGTON, a corporation, by E. B. BENN, its Receiver,

Plaintiff,

vs.

J. G. GRUVER, and THE AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Defendant.

COMPLAINT.

COMES NOW the plaintiff and for cause of action herein, alleges:

1. That the First National Bank of Kelso, Washington is a corporation duly organized and existing under and by virtue of the national banking laws of the United States of America and has for many years been engaged in the business of banking at the City of Kelso, in Cowlitz County, State of Washington.

2. That on the 23rd day of December, 1931, by action of the Board of Directors of said bank said bank was closed and placed in charge of the Comptroller of Currency of the United States. That on the 29th day of December, 1931, E. B. Benn was by the Comptroller of Currency of the United States of America, duly appointed Receiver of said The First National Bank of Kelso, Washington, and immediately qualified as such receiver and took possession of said bank and its assets and property, and is now the regularly appointed, qualified and acting Receiver for said bank.

3. That plaintiff brings this action in the United States District Court above named for the reason that said bank is now being liquidated by order, direction and authority of the Comptroller of Currency of the United States and by the Receiver herein named duly appointed and qualified.

4. That during all of the times hereinafter mentioned the defendant, J. G. Gruver was and now is the regularly elected qualified and acting Auditor

of Cowlitz County, State of Washington. [1*]

5. That on December 16th, 1930, the said J. G. Gruver as such Auditor filed in the office of the County Auditor of Cowlitz County, Washington, his official bond in the sum of Ten Thousand and no/100 ($10,000.) Dollars, said bond having been signed as surety by The American Surety Company of New York, a corporation, engaged in the business of executing surety bonds and which is qualified to execute such bonds in the State of Washington. That said bond was duly approved by the Prosecuting Attorney of Cowlitz County, Washington, and by the Board of County Commissioners of said County and has not been revoked in any manner.

6. That on the date when said bank was closed it had on deposit with said J. G. Gruver as County Auditor of Cowlitz County, Washington, certain school warrants the total amount of said warrants being the sum of One Thousand Five Hundred Three & 98/100 ($1503.98) Dollars; that said warrants were deposited with said County Auditor under the authority of the laws of the State of Washington as security for such money as from time to time might be deposited by said County Auditor from funds belonging to Cowlitz County, State of Washington, and not otherwise.

7. That at the time of closing said bank the said J. G. Gruver, County Auditor, had on deposit in said bank funds belonging to the State of Washington, in the sum of Fifty-seven & 71/100 ($57.71) Dollars,

*Page numbering appearing at the foot of page of original certified Transcript of Record.

with interest thereon amounting to Seventy Cents (70¢), making a total of Fifty-eight & 41/100 ($58.41) Dollars. That immediately following the closing of said bank the said J. G. Gruver acting as Auditor of Cowlitz County, Washington, sold the said school warrants on deposit with him as above set forth, receiving therefor the sum of One Thousand Five Hundred Sixty-eight & 59/100 ($1568.59) Dollars, and has failed, refused and neglected to deliver to said bank and its Receiver the amount of money [2] represented by the difference between said deposit and the proceeds of the sale of said warrants in the sum of One Thousand Five Hundred Ten & 18/100 ($1510.18) Dollars. That said Receiver herein has made demand upon said defendant J. G. Gruver for the payment of said sum of money, which demand has been denied and refused.

8. That the Receiver herein has been duly authorized and directed by the Comptroller of Currency of the United States to institute in this court an action for the recovery of said sum of One Thousand Five Hundred Ten & 18/100 ($1510.18) Dollars.

9. That plaintiff has procured to be entered herein an order authorizing this action to be brought against The American Surety Company of New York, defendant herein.

WHEREFORE, plaintiff prays that it may have judgment against the defendants herein, and each of them, for the sum of One Thousand Five Hundred Ten & 18/100 ($1510.18) Dollars, and that it may have judgment for its costs and disbursements

herein and for such other and further relief as to the Court may seem just.

Respectfully submitted,
T. P. FISK (Signed)
JOHN F. McCARTHY (Signed)
Attorneys for E. B. Benn, Receiver of
The First National Bank of Kelso.

State of Washington,
County of Cowlitz—ss.

E. B. Benn, being first duly sworn, on oath deposes and says: That he is the Receiver of the First National Bank of Kelso, an insolvent corporation; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

E. B. BENN (Signed)

Subscribed and sworn to before me this 23rd day of March, 1932. [3]

[Notarial Seal] MYRTLE M. DIXON (Signed)
Notary Public in and for the State of Washington, residing at Kelso.

[Endorsed]: Filed Mar. 24, 1932. Ed. M. Lakin, Clerk. By E.R., Deputy. [4]

[Title of Court and Cause.]

ANSWER OF DEFENDANT J. G. GRUVER

Comes now the defendant, J. G. Gruver, and for answer to the plaintiff's complaint, admits, denies and alleges.

I.

This defendant admits each and every allegation contained in paragraphs I, II, III, IV, V, VIII and IX of said complaint.

II.

Answering paragraph VI of said complaint, this defendant admits that on the 23rd day of December, 1931, when the First National Bank of Kelso closed, he had certain school warrants, amounting to the sum of $1,503.98, belonging to said bank which had been deposited with said defendant by said bank, but denies that said warrants had been deposited as security only for funds belonging to Cowlitz County and instead alleges that said warrants had been deposited with him for the purpose of securing him from loss for any funds lawfully deposited by him in said bank which might come into his hands by virtue of his office as auditor of Cowlitz County, Washington.

III.

Answering paragraph VII of said complaint, this defendant denies each and every allegation therein contained, except as hereinafter expressly admitted.

For further answer, affirmative defence and set off, this defendant alleges:

I.

That under and by virtue of the statutes of the state of Washington, and particularly section 6314, Rem. Comp. Stat., this defendant as auditor of Cowlitz County is required to receive applications and fees for Washington state motor vehicle licenses;

that on December 21st, 1931, this defendant as such county auditor had received fees from such motor vehicle licenses aggregating the sum of $833.00; that said [5] fees were in the form of cash, currency and checks drawn on various banks; that on said day he deposited the said sum of $833.00 in cash, currency and checks in the said First National Bank of Kelso and as part of the same transaction the First National Bank of Kelso drew two certain drafts payable to the treasurer of the State of Washington and drawn on the First National Bank of Seattle, Washington, one draft No. 2599, for the sum of $533.00 and one draft No. 2600, for the sum of $300.00; and that said drafts were immediately mailed to the state treasurer of the state of Washington.

II.

That under and by virtue of the statutes of the state of Washington, and particularly section 41, Chapter 178, Laws Extraordinary Session 1925, this defendant as auditor of Cowlitz County during the period between December 1st, 1931, and December 17th, 1931, issued one hunting and fishing license for Clark County, Washington, and received therefor the sum of $1.50, and issued six hunting and fishing licenses for Skamania County, Washington, and received therefor the sum of $9.00; that on the 17th day of December, 1931, he deposited the receipts of said sales, to-wit: $10.50 in cash in the First National Bank of Kelso and as part of the same transaction the First National Bank of Kelso drew one draft No. 2590 payable to the auditor of Skamania County, Washington, for the sum of $9.00 on the First Na-

tional Bank of Seattle, Washington, and one draft No. 2587 payable to the auditor of said Clark County for the sum of $1.50 on said First National Bank of Seattle; and that said drafts were immediately mailed to said county auditors of said respective counties.

III.

That before said drafts could be honored and paid in the regular course of business the First National Bank of [6] Kelso closed its doors and a national bank examiner was placed in charge; that said drafts were dishonored by the First National Bank of Seattle, were returned to the said several payees thereof not paid and by said payee returned to this defendant; that this defendant was required to and did immediately pay to the state treasurer of the state of Washington the said sum of $833.00, to the auditor of Clark County the sum of $1.50, and to the auditor of Skamania County sum of $9.00, making a total sum of $843.50 for all of said drafts; that this defendant still holds said drafts, which have not been paid by the said First National Bank of Kelso.

IV.

That on the 23rd day of December, 1931, when the First National Bank of Kelso closed, this defendant, as county auditor had a further deposit in said bank in the sum of $54.71; that the total amount of said deposit and said drafts aggregated $898.21.

V.

That on the 28th day of December, 1931, this defendant presented the said warrants to the county

treasurer of Cowlitz County, Washington, for payment and received therefore their face value and accumulated interest to date of said payment which amounted to sum of $1,568.59; that at the time of the payment of the said warrants this defendant did not know that the said drafts drawn in favor of the auditors of Clark and Skamania Counties, described as aforesaid, had been dishonored, whereupon this defendant tendered to the examiner in charge of the First National Bank of Kelso the sum of $680.88, the same being the difference between the amount received by this defendant from the payment of said warrants and the amount of defendant's deposit with said bank as determined by this defendant at that time. That the examiner [7] in charge refused to accept said sum of $680.88 and the receiver of said bank, plaintiff herein, has also refused to accept said amount; that this defendant has at all times been ready and willing to pay to the receiver of said bank the difference between the amount of his deposits and outstanding drafts as aforesaid and the amount received from the payment of said warrants which is the sum of $670.38, which amount this defendant tenders at this time and pays the same into the registry of this court herewith.

VI.

That the First National Bank of Kelso, by and through its officers, knew that said school warrants were deposited with this defendant for the purpose of securing him from loss by reason of any public funds deposited by him in said bank by virtue of his

office as said auditor of Cowlitz County, Washington, and particularly motor vehicle license fees collected by this defendant; and that all of said moneys were public moneys lawfully coming into the hands of this defendant as a public officer.

And for further answer, affirmative defence and set off, this defendant alleges:

I.

That all of said money deposited by this defendant in the First National Bank of Kelso for which drafts as aforesaid were issued by that bank in favor of the treasurer of the state of Washington and in favor of the auditor of Skamania County, Washington, and in favor of the auditor of Clark County, Washington, increased the assets of said First National Bank by the amount of said drafts and came into the possession of the national bank examiner, who took possession of said bank on the 23rd day of December, 1931, and thereafter into the possession of the receiver of said bank the plaintiff herein. [8]

II.

That the officers of said First National Bank of Kelso knew that the sum of $833.00 deposited by this defendant on the 21st day of December, 1931, for which the two drafts in favor of the treasurer of the state of Washington were issued were public funds paid by applicant for motor vehicle licenses; and the officers of said bank also knew the said sum of $10.50 deposited December 17th, 1931, for which the two drafts were issued in favor of the auditors

of Clark and Skamania counties were public funds paid by applicants for hunting and fishing licenses.

For further answer, affirmative defence and set off, this defendant alleges:

I.

That on the 21st day of December, 1931, at the time this defendant deposited the said sum of $833 in the First National Bank of Kelso the said bank was insolvent and was known by its officers to be so.

II.

That the amount of said deposit, to-wit: the sum of $833.00 increased the assets of said bank and has come into the hands of the receiver of said bank, the plaintiff herein.

WHEREFORE, this defendant prays that this action be dismissed and that he recover his costs and disbursements herein.

JOHN H. DUNBAR,
Atty. General.
LESTER T. PARKER,
Asst. Atty. Gen.
CECIL C. HALLIN,
J. E. STONE,
Attorneys for defendant J. G. Gruver.

State of Washington,
County of Cowlitz.—ss.

J. G. Gruver being first duly sworn upon his oath deposes and says: That he is the answering defendant above [9] named, that he has read the foregoing

answer, knows the contents thereof and the same are true as he verily believes.

J. G. GRUVER.

Subscribed and sworn to before me April 8th, 1932.

[Notarial Seal] J. E. STONE,
Notary Public for Washington, residing at Kelso.

Due legal service of foregoing Answer accepted April 9, 1932.

T. L. FISK,
of Attorneys for plaintiff.

[Endorsed]: Filed Apr. 16, 1932. Ed. M. Lakin, Clerk. By E. R. Deputy. [10]

[Title of Court and Cause.]

ANSWER OF THE AMERICAN SURETY COMPANY OF NEW YORK, defendant.

Comes now the defendant, The American Surety Company of New York, a corporation, and for answer to the plaintiff's complaint, admits, denies and alleges:

I.

This defendant admits each and every allegation contained in paragraphs I, II, III, IV, V, VIII and IX of said complaint.

II.

Answering paragraph VI of said complaint, this defendant admits that on the 23rd day of December,

1931, when the First National Bank of Kelso closed, defendant J. G. Gruver had certain school warrants, amounting to the sum of $1,503.98, belonging to said bank which had been deposited with said defendant by said bank, but denies that said warrants had been deposited as security only for funds belonging to Cowlitz County and instead alleges that said warrants had been deposited with said J. G. Gruver for the purpose of securing him from loss for any funds lawfully deposited by him in said bank which might come into his hands by virtue of his office as auditor of Cowlitz County, Washington.

III.

Answering paragraph VII of said complaint, this defendant denies each and every allegation therein, contained, except as hereinafter expressly admitted.

For further answer, affirmative defence and set off, this defendant alleges:

I.

That under and by virtue of the statutes of the state of Washington, and particularly section 6314 Rem. Comp. Stat., the defendant J. G. Gruver as auditor of Cowlitz County is [11] required to receive applications and fees for Washington motor vehicle licenses; that on December 21st, 1931, the defendant J. G. Gruver as such county auditor had received fees from such motor vehicle licenses aggregating the sum of $833.00; that said fees were in the form of cash, currency and checks drawn on various banks; that on said day he deposited the

said sum of $833. in cash, currency and checks in the said First National Bank of Kelso and as part of the same transaction the First National Bank of Kelso drew two certain drafts payable to the treasurer of the state of Washington and drawn on the First National Bank of Seattle, Washington, one draft No. 2599, for the sum of $533.00 and one draft No. 2600, for the sum of $300.00; and that said drafts were immediately mailed to the State Treasurer of the state of Washington.

II.

That under and by virtue of the statutes of the state of Washington, and particularly section 41, chapter 178, Laws Extraordinary Session 1925, defendant J. G. Gruver as auditor of Cowlitz County during the period between December 1st, 1931 and December 17th, 1931, issued one hunting and fishing license for Clark County, Washington and received therefor the sum of $1.50, and issued six fishing and hunting licenses for Skamania County, Washington, and received therefor the sum of $9.00; that on the 17th day of December, 1931, said auditor deposited the receipts of said sales, to-wit: $10.50 in cash in the First National Bank of Kelso and as part of the same transaction the First National Bank of Kelso drew one draft for No. 2590 payable to the auditor of Skamania County, Washington, for the sum of $9.00 on the First National Bank of Seattle, Washington, and one draft No. 2587 payable to the auditor of said Clark County for the sum of $1.50 on said First National Bank of Seattle; and that

the said drafts [12] were immediately mailed to the said county auditors of said respective counties.

III.

That before said drafts could be honored and paid in the regular course of business the First National Bank of Kelso closed its doors and a national bank examiner was placed in charge; that said drafts were dishonored by the First National Bank of Seatfle, were returned to the said several payees thereof not paid and by said payee returned to defendant J. G. Gruver; that defendant J. G. Gruver was required to and did immediately pay to the state treasurer of the state of Washington the said sum of $833.00, to the auditor of Clark County the sum of $1.50, and to the auditor of Skamania County sum of $9.00, making a total sum of $843.50 for all of said drafts; that defendant J. G. Gruver still holds said drafts, which have not been paid by the First National Bank of Kelso.

IV.

That on the 23rd day of December, 1931, when the First National Bank of Kelso closed, defendant J. G. Gruver, as county auditor of said county had a further deposit in said bank in the sum of $54.71; that the total amount of said deposit and said drafts aggregated $898.21.

V.

That on the 28th day of December 1931, defendant J. G. Gruver presented said warrants to the County treasurer of Cowlitz County, Washington,

for payment and received therefor their face value and accumulated interest to date of said payment which amounted to the sum of $1,568.59; that at the time of the payment of the said warrants the defendant Gruver did not know that the said drafts drawn in favor of the auditors of Clark and Skamania Counties, described as [13] aforesaid, had been dishonored, whereupon defendant J. G. Gruver tendered to the examiner in charge of the First National Bank of Kelso the sum of $680.88, the same being the difference between the amount received by defendant Gruver from the payment of said warrants and the amount of said defendant Gruver's deposit with said bank as determined by defendant Gruver at that time. That the examiner in charge refused to accept said sum of $680.88 and the receiver of said bank, plaintiff herein, has also refused to accept said amount; that the defendant Gruver has at all times been ready and willing to pay to the receiver of said bank the difference between the amount of his deposits and outstanding drafts as aforesaid and the amount received from the payment of said warrants which is the sum of $670.38, which amount defendant J. G. Gruver has payed into the registry of this court for the use and benefit of the plaintiff.

VI.

That the First National Bank of Kelso, by and through its officers, knew that said school warrants were deposited with defendant J. G. Gruver for the purpose of securing him from loss by reason of any public funds deposited by him in said bank by vir-

tue of his office as said auditor of Cowlitz County, Washington, and particularly motor vehicle license fees collected by said defendant Gruver; and that all of said moneys were public moneys lawfully coming into the hands of defendant Gruver as a public officer.

And for further answer, affirmative defence and set off this defendant alleges:

I.

That all of said money deposited by the defendant Gruver in the First National Bank of Kelso for which drafts as aforesaid were issued by that bank in favor of the treasurer of the state of Washington and in favor of the auditors of [14] Skamania County, Washington, and in favor of the auditor of Clark County, Washington, increased the assets of the said First National Bank by the amount of said drafts and came into possession of the national bank examiner, who took possession of said bank on the 23rd day of December, 1931, and thereafter into the possession of the receiver of said bank the plaintiff herein.

II.

The officers of the First National Bank of Kelso knew that the sum of $833.00 deposited by defendant J. G. Gruver on the 21st day of December 1931, for which the said two drafts in favor of the treasurer of the state of Washington were issued were public funds paid by applicants for motor vehicle licenses; and the officers of said bank also knew the said sum of $10.50 deposited December 17th, 1931 for which two drafts were issued in favor of the

auditor of Clark and Skamania counties were public funds paid by applicants for hunting and fishing licenses.

And for further answer, affirmative defence and set off, this defendant alleges:

I.

That on the 21st day of December 1931, at the time defendant J. G. Gruver deposited the said sum of $833.00 in the First National Bank of Kelso the said bank was insolvent and was known by its officers so to be.

II.

That the amount of said deposit, to-wit: the sum of $833.00 increasing the assets of said bank and has come into the hands of the receiver of said bank, the plaintiff herein.

WHEREFORE, this answering defendant prays that this action be dismissed and that it recover its costs and disbursements herein.

J. E. STONE,
Attorney for defendant The American Surety Company of New York, a corporation. [15]

State of Washington,
County of King.—ss.

L. H. Melresey being first duly sworn says that he is the agent of the defendant The American Surety Company of New York, a corporation, and makes this verification for and on behalf of the said The American Surety Company of New York; that he has read the foregoing Answer, knows the con-

tents thereof, and the same are true as he verily believes.

L. H. MELRESEY.

Subscribed and sworn to before me April 19, 1932.

[Seal] CARL L. RANDALL,
Notary Public for Washington, residing at Seattle.

[Endorsed]: Filed Apr. 23, 1932. Ed. M. Lakin, Clerk. By E. W. Pettit, Deputy. [16]

[Title of Court and Cause.]

REPLY TO ANSWER OF DEFENDANT J. G. GRUVER.

Comes now the plaintiff and in reply to the first affirmative defense set forth in the answer of the defendant J. G. Gruver admits, denies and alleges, as follows:

1. Plaintiff denies each and every allegation contained in said affirmative defense, except as alleged in the complaint herein and except as hereinafter expressly admitted.

2. Plaintiff admits that on the 21st day of December, 1931, the defendant J. G. Gruver, purchased from the First National Bank of Kelso two certain drafts payable to the Treasurer of the State of Washington and drawn on the First National Bank of Seattle, Washington, one of said drafts being for the sum of $533.00 and the other being for the sum of $300.00.

3. Plaintiff admits that on the 17th day of De-

cember, 1931, the defendant, J. G. Gruver, purchased from the First National Bank of Kelso, Washington, a draft on the First National Bank of Seattle, Washington, payable to the auditor of Skamania County, Washington, for the sum of $9.00 and that said defendant also purchased from said bank on said day a draft drawn on The First National Bank of Seattle, Washington, payable to the Auditor of Clark County, Washington, for the sum of $1.50.

In Reply to the Second and Third Affirmative Defenses set forth in the answer of said defendant, plaintiff denies each and every allegation contained in said affirmative defenses and each of them, except as alleged in the complaint herein.

WHEREFORE, plaintiff prays that it have judgment against defendants in accordance with the demands of its complaint.

FISK & McCARTHY,
Attorneys for plaintiff,
By JOHN F. McCARTHY,
Of Counsel. [17]

State of Washington,
County of Cowlitz.—ss.

E. B. Benn, being first duly sworn, on oath deposes and says: That he is the Receiver of the First National Bank of Kelso, an insolvent corporation; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

E. B. BENN.

Subscribed and sworn to before me this 26th day of April, 1932.

[Seal] MYRTLE M. DIXON,
Notary Public in and for the State of Washington, residing at Kelso.

[Endorsed]: Filed Apr. 26, 1932. Ed. M. Lakin, Clerk. By E. R., Deputy. [18]

[Title of Court and Cause.]

REPLY TO ANSWER OF DEFENDANT, THE AMERICAN SURETY OF NEW YORK.

Comes now the plaintiff and in reply to the first affirmative defense set forth in the answer of the defendant The American Surety Company of New York, a corporation admits, denies and alleges, as follows:

1. Plaintiff denies each and every allegation contained in said affirmative defense, except as alleged in the complaint herein and except as hereinafter expressly admitted.

2. Plaintiff admits that on the 21st day of December, 1931, the defendant J. G. Gruver, purchased from the First National Bank of Kelso two certain drafts payable to the Treasurer of the State of Washington and drawn on the First National Bank of Seattle, Washington, one of said drafts being for the sum of $533.00 and the other being for the sum of $300.00.

3. Plaintiff admits that on the 17th day of De-

cember, 1931, the defendant, J. G. Gruver, purchased from the First National Bank of Kelso, Washington, a draft on the First National Bank of Seattle, Washington, payable to the auditor of Skamania County, Washington, for the sum of $9.00 and that said defendant also purchased from said bank on said day a draft drawn on The First National Bank of Seattle, Washington, payable to the Auditor of Clark County, Washington, for the sum of $1.50.

In Reply to the Second and Third Affirmative Defenses set forth in the answer of said defendant, plaintiff denies each and every allegation contained in said affirmative defenses and each of them, except as alleged in the complaint herein.

WHEREFORE, plaintiff prays that it have judgment against defendants in accordance with the demands of its complaint.

FISK & McCARTHY,
Attorneys for Plaintiff,
By JOHN F. McCARTHY,
Of Counsel. [19]

State of Washington,
County of Cowlitz.—ss.

E. B. Benn, being first duly sworn, on oath deposes and says: That he is the Receiver of the First National Bank of Kelso, an insolvent corporation; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

E. B. BENN.

Subscribed and sworn to before me this 26th day of April, 1932.

[Notarial Seal] MYRTLE M. DIXON,
Notary Public in and for the State of Washington, residing at Kelso.

[Endorsed]: Filed Apr. 26, 1932. Ed. M. Lakin, Clerk. By E. R., Deputy. [20]

In the United States District Court, Western District of Washington, Southern Division.

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 7th day of October, 1932, the Hon. Edward E. Cushman, U. S. District Judge, presiding, among other proceedings had were the following, taken and copied from the minute record of said Court:

No. 8261

First National Bank of Kelso
By E. B. Benn, its Receiver,

Plaintiff,

vs.

J. G. Gruver and American Surety Co. of New York,

Defendants.

RECORD OF TRIAL.

On this 7th day of October, 1932, this cause comes on for trial, Thos. McCarthy appearing for plain-

tiff and J. E. Stone and Cecil Hallin appearing as attorneys for defendants. Upon oral stipulation jury is waived. [21]

[Title of Court and Cause.]

MEMORANDUM DECISION AFTER TRIAL.

Where the words "the bank" are used in this decision The First National Bank of Kelso, Washington, is intended.

Plaintiff, receiver of the bank, sues the auditor of Cowlitz County and his bondsman to recover money received by the auditor in payment of certain school warrants deposited by the bank with the auditor as security.

Plaintiff alleges that the warrants were deposited as security for such money or funds belonging to Cowlitz County as from time to time might be deposited by the auditor in the bank. [22]

Defendants allege that the warrants were deposited for the purpose of securing the auditor for any public funds deposited by him as auditor.

Under written stipulation the cause was tried to the Court without a jury.

The defendants concede that the facts are substantially as stated in plaintiff's brief as follows:

* * * * * * *

> "The defendant in the course of his duties as County Auditor is required to and does collect certain monies belonging to Cowlitz County consisting of marriage license fees and fees for

hunting and fishing licenses for that county. As far as the record shows, these monies are the only monies belonging to Cowlitz County which the defendant retains in his possession; * * *

The defendant is also required to, and does, receive applications for motor vehicle licenses from the State of Washington, and in behalf of the State collects the fees for such licenses at the time the applications are made. In addition to the amount of the license fees, the Auditor charges a fee of twenty-five cents for each application and this additional fee belongs to the county and is turned over to the County Treasurer. In receiving applications and collecting the fees for motor vehicle license the defendant acts as a collection agency for the State and the funds so received by him belong to the State of Washington and are remitted daily to the State Treasurer.

The defendant also issues hunting and fishing licenses for other counties and the fees received for such licenses belong to such other counties and are remitted at varying intervals. In cases where the funds received for such licenses are not remitted immediately the same are held in the office of the County Auditor until the remittance is made.

At the times involved in this action the defendant had two checking accounts in the plaintiff bank, one called the "trust fund" account, in which only monies received from marriage license fees were deposited and the other called

the "game fund" account, in which only funds received from hunting and fishing licenses for Cowlitz County were deposited. These two accounts are the only accounts which the defendant ever had in the bank.

The record shows that for a period of at least six months prior to the closing of the bank it was the custom of the defendant to make the remittances of automobile license fees to the State Treasurer by [23] drafts drawn by the plaintiff bank on the First National Bank of Seattle, and that the remittances to other counties for hunting and fishing licenses issued for such other counties were likewise made by drafts drawn by the plaintiff bank upon other banks. These drafts were in every instance purchased by the defendant and paid for in cash" (currency, silver and checks) "at the time the same were issued. The record shows that in no instance were any of such drafts purchased or paid for out of the funds which had been on deposit in the bank, and in no instance were any of the motor vehicle license funds or outside county fishing license funds ever deposited in the bank, unless it could be said that the mere payment" ('delivery', rather than the words 'mere payment' would be more descriptive of this act) "of these funds to the bank in exchange for the drafts mentioned would constitute a deposit of the same.

The record shows that during the period from April 1st, 1931 to October 1st, 1931, the daily

balance in the game fund account amounted to from $800.00 to $1800.00, and that the average daily balance in the trust fund account amounted to $30.00 or $40.00.

On the 9th day of April, 1931, the bank turned over to the defendant certain school warrants of the total face value of $1503.98, and the terms and conditions under which such school warrants were turned over to the defendant are set forth in a written instrument which reads as follows:—

"Office of
J. G. Gruver
County Auditor
Court House.
Kelso, Washington. April 9th, 1931.

RECEIVED of The First National Bank, Kelso, Washington, as security for Cowlitz County funds deposited by me, and to be deposited by me, in such bank, various School District warrants as follows:

School Dist. No.	Warrant No.	Bank's No.	Amount
127	6	2119	$125.00
127	10	2123	123.00
127	16	2122	175.00
127	17	2125	143.00
127	26	2130	150.00
127	29	2137	123.00
127	34	2132	100.25
127	40	2153	116.75
127	47	2120	111.00
127	54	2126	87.75

School Dist. No.	Warrant No.	Bank's No.	Amount
127	64	2146	99.00
127	67	2124	99.00
127	81	2121	10.00
127	108	2151	41.23

TOTAL — Fifteen Hundred Three & 98/100 Dollars $1,503.98

[24]

Dated at Kelso, Washington, April 9th, 1931.
(Sig.) J. G. Gruver County Auditor.'

On December 17th, 1931, the defendant purchased from the plaintiff bank a draft on The First National Bank of Seattle for the sum of $10.50, payable to the Auditor of Skamania County, Washington, and a similar draft for the sum of $1.50, payable to the Auditor of Clark County, Washington. These drafts were paid for in cash and represented funds received by the defendant for hunting and fishing licenses issued by him for Skamania and Clark counties, respectively.

On December 21st, 1931, the defendant had on hand the sum of $833.00 in the form of cash, "(silver) "currency and checks which had been received by him in payment of automobile license fees for the State of Washington and on that day he purchased from the plaintiff bank two drafts drawn on The First National Bank of Seattle and payable to the Treasurer of the State of Washington, one being for the sum of

$533.00 and the other for the sum of $300.00. These drafts were paid for by the defendant with the cash," (silver) "currency and checks above referred to. At the time the various drafts herein mentioned were issued the plaintiff bank had sufficient funds or credit in The First National Bank of Seattle to pay the same upon presentation and the same would have been paid had it not been for the closing of the plaintiff bank prior to the time the drafts were presented for payment." (That is, there would have been sufficient funds in The First National Bank of Seattle for a draft upon a Portland bank payable to the First National Bank of Seattle then in the mails to have been paid, which it was not.)

"The record shows that the last date on which plaintiff bank did business was December 22nd, 1931, and that the Comptroller of the Currency of the United States took charge of the bank on the morning of the 23rd day of December, 1931, for the purpose of liquidation. At the time of the closing of the bank as aforesaid the defendant had on deposit in the bank in the trust fund account and in the game fund account a total balance of $57.71, together with interest thereon amounting to 70¢, making a total of $58.41.

After the closing of the plaintiff bank and on or about the 28th day of December, 1931, the defendant sold the school warrants which had been deposited with him, receiving in payment therefor the sum of $1568.59, and after deducting

therefrom the amount represented by the balance of his deposit in the trust fund and game fund, together with the amount of the drafts above referred to, tendered the balance amounting to $680.38 to the Examiner in Charge of the plaintiff bank. This tender was refused by the Examiner and demand was made upon the defendant for the sum of $1510.18, the same being the balance of the proceeds of said warrants, after deducting therefrom the amount of the balances in the trust and game accounts at the time of the closing of the bank. After the commencement of this action the [25] defendant tendered into court the sum of $680.38 and the same has been paid to the plaintiff under the terms of a stipulation in which it is agreed that the acceptance of the same should" (not) "prejudice the plaintiff's right to recover any additional sum which the Court may find owing to the plaintiff in this action."

The funds received from the auditor by the bank were immediately co-mingled with the bank's other funds.

PLAINTIFF cites: Cohn vs. Dunn, 70 A. L. R. page 740; Van Doren R. & C. Co. vs. Guardian Gas & G. Co., 99 Wash. 68; 21 R. C. L. p. 653; 49 C. J. 936; 49 C. J. 942; Reynes vs. Dumont, 130 U. S. 354; Armstrong vs. Chemical Bank, 41 Fed. 234; Scott vs. Armstrong, 146 U. S. 499; 57 Corpus Juris 396; 57 Corpus Juris, 421; 57 Corpus Juris 426;

Mansfield vs. Yates-American Machine Co., 153 Wash. 345; In re Bevins, 165 Fed. 434; Fidelity & Deposit Co. vs. Haines, 23 L. R. A. 652; United States Fidelity & Guaranty Company vs. Wolldridge, 268 U. S. 234; 34 CYC 194; Quin vs. Earle, 95 Fed. 728; Charles T. Cherry vs. Territory of Oklahoma, 8 L. R. A. (N.S.) 1254.

DEFENDANTS cite: Morse on Banks and Banking, Vol. 3, p. 316; Leach vs. City Commercial Savings Bank of Mason City, 212 N. W. 746; Standard Oil Co. vs. Veigel, 219 N. W. 863; Leach vs. Battle Creek Savings Bank, 211 N. W. 527; Spiroplos vs. Scandinavian-American Bank, 116 Wash. 491, 16 A. L. R. 181; State ex rel. Kern & Kibbe vs. Hinton, 68 Wash. Dec. 156; Morse on Banks and Banking, Vol. 3, p. 322; State of South Dakota vs. Fiman, 29 Fed. (2d) 770; Remington's Compiled Statutes of Washington, Section 5548, as amended by chapter 304, Laws of Washington, 1921; State of South Dakota vs. Fiman, 29 Fed. (2d) 770, certiorari denied, 279 U. S. 845; City of Macon vs. Farmer's Trust Co., 29 S. W. (2d) 643; State vs. Page Bank of St. Louis County, 14 S. W. (2d) 597; Remington's Compiled Statutes of Washington, Sections 265 and [26] 266; Frick et al. vs. Clements, et al., 31 Fed. 542; Charney vs. Sidley, 73 Fed. 980; Dotson vs. Kirk, 180 Fed. 14; Payne vs. Clark, 271 Fed. 525; Woodlawn Farm Dairy Co. vs. Erie R.R. Co., 282 Fed. 278; Longsdorf Cyclopedia of Federal Procedure, Vol. 2, page 597.

CUSHMAN, District Judge:

It will not be necessary herein to discuss all of the points argued in the briefs. The discussion will be confined to two matters: First, were the funds exchanged by the auditor for drafts upon the Seattle bank for transmittal to the State Treasurer and auditors of other counties "Cowlitz County funds"? Second, did the delivery of such funds to the bank in exchange for such drafts constitute a "deposit" in the bank?

The provisions of the Washington law touching the oath, bond, general duties and fee bill of county auditors are set forth in Sections 4083 to 4105 of Remington's Revised Statutes of Washington.

The auditor is a salaried officer and his fees are paid to the County Treasurer on the first Monday of each month. Section 4217, Remington's Revised Statutes of Washington.

The duties of the auditor in relation to the collection of money on account of automobile license applications are defined in Section 6317, Remington's Compiled Statutes of Washington * * * those in relation to hunting and fishing licenses, by Section 5967. See also Sec. 5501, Remington's Compiled Statutes of Washington.

The county is a municipal corporation and agency of the State. Article XI, State Constitution, Sections 4 and 12. Lincoln County vs. Brock, 37 Wash. 14-16. The officers [27] of the county and their duties, it is provided in the Constitution, are to be prescribed by the State Legislature. Article XI, Section 5. This section, in part, provides:

* * * * * * *

"And it" (State legislature) "shall provide for the strict accountability of such officers for all fees which may be collected by them, and for all public moneys which may be paid to them, or officially come into their possession."

Bonds of county officers are made to the State. Section 9930, Remington's Compiled Statutes of Washington.

That a county is an agency of the State has been decided both by the courts of the State and the United States. Rogers Locomotive Works vs. Emigrant Co., 164 U. S. 559-576; State of Washington ex rel Board of Commissioners vs. Clausen, 95 Wash. 214. It is because of this fact that Federal income taxes on municipal bonds have been held unconstitutional. Pollock vs. Farmer's Loan and Trust Company, 157 U. S. 429.

A county officer is one by whom the county performs its functions. Sheboygan Co. vs. Parker, 3 Wal. 93 (70 U. S.).

While the auditor may have been in one sense the agent of the State and of Clarke and Skamania counties in these matters, he was also the agent of Cowlitz county, which, in a broader sense, was the State's agent. The county determines what is suitable and necessary in the furnishing and equipping of the office in which the auditor must discharge his duties, including those of collecting and keeping public funds. Sections 4032 and 4056, Remington's Revised Statutes of Washington.

While as between the county and the State the

funds in question belonged to the State,—as between the county and the bank, at the time they were received by the bank, they were also county funds. [28]

Concerning the second question as to whether the transaction described was a "deposit", it may be conceded that were the transaction one between the bank and the ordinary bank customer with a checking account therein it would not, under the circumstances, be a deposit, Reynes vs. Dumont, 130 U. S. 354, but in view of the strict accountability to which county officers are held in handling public money and particularly in view of the constitutional provision above quoted, these funds were "deposited with the bank". Upon their delivery by the auditor to the bank, title passed to the bank and the bank became the debtor in case of non-payment of the draft—a debtor subject to suit either by the county or its auditor when paid by them. Such drafts of the bank, insofar as effect and principle are concerned, were not essentially different from demand certificates of deposit.

Judgment will be for defendants.

So concluding, discussion of other questions argued is not necessary.

Any findings, conclusions and judgment herein will be settled upon notice.

The Clerk will notify the attorneys for the parties of the foregoing decision.

[Endorsed]: Filed Jan. 3, 1933. Ed. M. Lakin, Clerk. By E. R., Deputy. [29]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

BE IT REMEMBERED, That on the 7th day of October, 1932, the above entitled cause came regularly on for trial before the above entitled Court, plaintiffs appearing in person and by attorney, and defendants appearing in person and by attorney, and the court having heard and considered the evidence, both oral and documentary, introduced and received on the trial of said cause by the parties plaintiff and defendant, and the arguments of counsel for the respective parties thereon, and the Court being advised in the law and the premises, makes the following:

FINDINGS OF FACT.

I.

That the First National Bank of Kelso, Washington, at all times mentioned in plaintiff's complaint, was a banking corporation duly organized and existing under and by virtue of the national banking laws of the United States of America and that on the 23rd day of December, 1931, said bank was closed and placed in charge of the Comptroller of Currency of the United States; that on the 29th day of December, 1931, E. B. Benn, was by the Comptroller of Currency of the United States of America duly appointed receiver of the First National Bank of Kelso, Washington, and immediately qualified as such receiver and took possession of said bank, its assets and property and is and

was at all times mentioned in plaintiff's complaint, the duly appointed, qualified and acting receiver of and for said bank, and was duly authorized to begin and prosecute the above entitled cause.

II.

That the above named defendant J. G. Gruver was at all times mentioned in plaintiff's complaint, the duly elected, qualified [30] and acting auditor of Cowlitz County, State of Washington; and that the defendant, The American Surety Company of New York, a corporation, was at all times mentioned in plaintiff's complaint, the bondsman on defendant Gruver's official bond as such county auditor, which said bond was, at all times mentioned in plaintiff's complaint in full force and effect.

III.

That the said defendant J. G. Gruver in the course of his official duties as county auditor of Cowlitz County, Washington, was required to and did collect certain moneys belonging to said Cowlitz County, consisting of marriage license fees, and fees for hunting and fishing licenses for said county, and that these monies thus collected are the only monies belonging to Cowlitz County which the defendant Gruver retained in his possession.

IV.

That the said defendant Gruver as county auditor was also required to and did receive applications for motor vehicle licenses for the State of Washington, and on behalf of the state collected the fees

for such licenses at the time applications were made, for the same, and in addition to the amount of the license fees thus paid, the auditor charged a fee of twenty-five cents for each application, and that such additional fee thus charged belonged to said Cowlitz County to be turned over to the county treasurer of said county; that in receiving applications and collecting the fees for motor vehicle licenses, the said defendant Gruver acted as agent for the State of Washington and the funds so received by him belonged to the State of Washington and were to be remitted daily to the state treasurer of said state.

V.

That the defendant Gruver as part of his official duties [31] as county auditor, at all times mentioned in plaintiff's complaint, issued hunting and fishing licenses for other counties throughout the State of Washington and the fees thus received for such licenses belonged to such other counties and were remitted to said counties at varying intervals, and where the funds received for such licenses were not remitted immediately, the same were held in the office of the said county auditor of Cowlitz County until the remittances were made.

VI.

That at all times set out in plaintiff's complaint, the said defendant Gruver as county auditor had two checking accounts in the plaintiff bank; one called trust fund account in which only monies received from marriage license fees were deposited

and the other called the game fund account, in which only funds received for hunting and fishing licenses from Cowlitz County were deposited, and these two accounts constituted the only accounts that the defendant Gruver had in said bank.

VII.

That for a period of at least six months prior to the closing of said plaintiff bank, it was the custom of said defendant Gruver, as county auditor, to make the remittances of automobile license fees to the state treasurer by draft drawn by the plaintiff bank on the First National Bank of Seattle, and that the remittances to other counties for hunting and fishing licenses issued for such other counties were likewise made by drafts drawn by the plaintiff bank upon other banks.

These drafts were in every instance purchased by the defendant Gruver as county auditor of Cowlitz County and paid for in currency, silver and checks at the time the same were [32] issued, and that in no instance were any of such drafts purchased or paid for out of the funds which had been on deposit in the bank and in no instance were any of the motor vehicle license funds or outside county hunting and fishing license funds deposited in the bank except the currency, silver or checks deposited by said auditor at the time of receiving the plaintiff bank's draft for same.

VIII.

That during the period from April 1, 1931, to October 1, 1931, the daily balance which said defendant Gruver as auditor had on deposit with said

plaintiff bank in the game fund amounted to from $800.00 to $1,800.00 and the average daily balance in said bank in the trust fund account amounted approximately forty dollars.

IX.

That on the 9th day of April, 1931, the plaintiff bank turned over to the defendant Gruver certain school warrants of the total face value of $1503.98 and the terms and conditions under which said school warrants were turned over to the defendant were set forth in a written instrument which reads as follows:

"Office of
J. G. Gruver,
County Auditor,
Court House,
Kelso, Washington. April 9th, 1931.

RECEIVED of The First National Bank, Kelso, Washington, as security for Cowlitz County funds deposited by me, and to be deposited by me, in such bank, various School District warrants as follows:

School Dist. No.	Warrant No.	Bank's No.	Amount
127	6	2119	$125.00
127	10	2123	123.00
127	16	2122	175.00
127	17	2125	143.00
127	26	2130	150.00
127	29	2137	123.00
127	34	2132	100.25

[33]

School Dist. No.	Warrant No.	Bank's No.	Amount
127	40	2153	116.75
127	47	2120	111.00
127	54	2126	87.75
127	64	2146	99.00
127	67	2124	99.00
127	81	2121	10.00
127	108	2151	41.23

Total—Fifteen Hundred Three & 98/100 Dollars $1,503.98

Dated at Kelso, Washington, April 9th, 1931.

(Sig) J. G. Gruver, County Auditor.

It being agreed by and between said plaintiff bank and said defendant Gruver that such warrants were to protect all funds coming into his hands as County Auditor and deposited by him in said bank as such auditor.

X.

That on December 17, 1931, the defendant Gruver as auditor purchased from the plaintiff bank a draft on the First National Bank of Seattle, in the sum of $10.50 payable to the auditor of Skamania county, Washington, and a similar draft in the sum of $1.50 payable to the auditor of Clark county, Washington; and that these drafts were paid for in cash and represented funds received by the defendant Gruver for hunting and fishing licenses issued by him for Skamania and Clark Counties respectively.

XI.

That on December 21, 1931, the defendant Gruver had on hand the sum of $833.00 in the form of silver, currency and checks which had been received by him as auditor in payment of automobile license fees for the state of Washington, and on that date he purchased from the plaintiff bank two drafts drawn on the First National Bank of Seattle and payable to the treasurer of the state of Washington, one being for the sum of $533.00, and the other for the sum of $300.00, and that these drafts were paid for by the said defendant Gruver in silver, currency and checks. [34]

That at all times the various drafts herein mentioned were issued, plaintiff bank had sufficient funds or credit in the First National Bank of Seattle to pay the same and the same would have been paid had it not been for the closing of plaintiff bank prior to the time the drafts were presented for payment.

XII.

That the last date upon which plaintiff bank did business was December 22, 1931, and that the Comptroller of Currency of the United States took charge of the bank on the morning of the 23rd day of December, 1931, for the purpose of liquidation, and that at the time of the closing of said bank as aforesaid, the defendant Gruver as auditor had on deposit in the said bank in the trust fund account and in the game fund account a total balance of $57.71 together with interest thereon amounting to $.70 making a total of $58.41.

XIII.

That after the closing of the plaintiff bank and on or about the 28th day of December, 1931, the defendant Gruver, as auditor, sold the school warrants which had been deposited with him receiving in payment therefor the sum of $1568.59, and after deducting therefrom the amount represented by the balance of his deposit in the trust fund and game fund accounts together with the amount of the drafts herein referred to, tendered the balance amounting to the sum of $680.38 to the Examiner in charge of plaintiff bank, which tender was refused by the Examiner and demand made upon the defendant Gruver for the sum of $1510.18, being the balance of the proceeds of said warrants after deducting therefrom the amount of the balances in the trust and game accounts at the time of the closing of said plaintiff bank, And that after the commencement of this action, the said defendant Gruver as auditor has tendered into [35] Court the sum of $680.38, the same having been paid to plaintiff pursuant to the terms of the stipulation entered into between the parties, and the funds received by said auditor from said bank immediately co-mingled with the bank's other funds.

Done at Tacoma this 13th day of March, A. D. 1933.

EDWARD E. CUSHMAN,
Judge.

From the foregoing facts found, the court concludes as follows:

CONCLUSIONS OF LAW.

I.

That the said defendant J. G. Gruver was acting as an officer and agent of Cowlitz County, Washington, at the time he collected and received the fees referred to and set out in the Findings of Fact herein, and that as between the State of Washington and the Counties of Clark and Skamania, the monies thus collected by the said defendant Gruver belonged to the State of Washington or to the Counties of Clark and Skamania according to their respective rights as between Cowlitz County and plaintiff bank at the time they were received by plaintiff bank, they were county funds of said Cowlitz County.

II.

That in purchasing the drafts, referred to in the Findings of Fact herein set out, by the said defendant Gruver as auditor of said county, and paying for same with funds representing license fees collected by said defendant Gruver as such county auditor, such funds were deposited with said plaintiff bank upon the delivery of same to said bank and title thereto passed to said plaintiff bank and said bank became a debtor of Cowlitz County in the event of the non-payment of the draft or drafts issued by said plaintiff bank.

III.

That defendant Gruver as county auditor had the right to sell the school warrants deposited with him by plaintiff bank and to deduct from the proceeds received from such sale monies on deposit in said plaintiff bank belonging to Cowlitz County deposited therein by said defendant Gruver as County Auditor and to deduct therefrom the face value of the several drafts referred to in the Findings of Fact herein and to pay the balance of such monies received from the balance of said school warrants to the person or persons in charge of the affairs of said plaintiff bank lawfully entitled to receive same, and that such payment has been made by said defendant Gruver pursuant to a stipulation on file herein.

IV.

That defendants are entitled to a judgment of dismissal herein with costs taxed in their favor. [36]

Done at Tacoma, this 13th day of March, A. D. 1933.

EDWARD E. CUSHMAN,
Judge.

Due and timely service of the foregoing Findings of Fact and Conclusions of Law acknowledged and true copy thereof received this 17th day of February, 1933.

JOHN F. McCARTHY,
of Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 13, 1933. Ed. M. Lakin, Clerk. By E. R., Deputy. [37]

In the United States District Court for the Western District of Washington, Southern Division.

No. 8261

THE FIRST NATIONAL BANK OF KELSO, WASHINGTON, a corporation, by E. B. BENN, its Receiver,

Plaintiff.

vs.

J. G. GRUVER, and THE AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Defendant.

JUDGMENT.

BE IT REMEMBERED: That on the 7th day of October, 1932, the above entitled cause came regularly on for trial before the above entitled court, plaintiffs appearing in person and by attorney, and defendants appearing in person and by attorney, and Court having heard and considered the evidence, both oral and documentary, introduced and received on the trial of said cause by the parties plaintiff and defendant, and the arguments of counsel for the respective parties thereon, and the Court having heretofore made, filed and entered its Findings of Fact and Conclusions of Law, which Findings of Fact and Conclusions of Law are hereby specifically referred to and by reference made a part hereof, and the court being advised in the law and the premises;

It is by the court CONSIDERED, ORDERED,

ADJUDGED AND DECREED that the above entitled action be and the same is hereby decreed to be dismissed with costs in favor of defendants to be taxed according to law.

Done at Tacoma this 13th day of March, A. D. 1933.

EDWARD E. CUSHMAN,
Judge.

Due and timely service of the foregoing Judgment acknowledged and true copy thereof received this 17th day of February, 1933.

JOHN F. McCARTHY
of Attorneys for Plaintiff. [38]

K

TREASURY DEPARTMENT
Washington #8261

Comptroller of the Currency
Address reply to
"Comptroller of the Currency"
Mr. E. B. Benn, Receiver,
The First National Bank,
Kelso, Washington.
Dear Sir:

This office acknowledges receipt of a letter dated May 4, 1933, addressed to the Comptroller of the Currency from Fisk and McCarthy, Esquires, attorneys for the First National Bank trust, respecting the appeal authorized by telegram dated January

18th, 1933, of the litigation of your trust against Cowlitz County Auditor.

Your attorneys request that the Comptroller of the Currency file a certificate stating that the appeal is taken under and by virtue of the express direction of the Comptroller. It is not usual for the Comptroller of the Currency to file certificates in matters of this kind in the various Federal Courts throughout the United States, since the letter of the Comptroller may be filed in Court as a part of the record. Accordingly, the Comptroller of the Currency hereby instructs and directs you as receiver of the insolvent First National Bank of Kelso, Washington, to note and perfect an appeal from the decision of the trial court filed January 3rd, 1933, in the litigation titled "First National Bank of Kelso, Washington, a corporation, by E. B. Benn, its Receiver, plaintiff, vs. J. G. Gruver and The American Surety Company of New York, a corporation, defendants." and you are directed to instruct your attorneys to take appropriate steps for the perfection of such appeal in the United States Circuit Court of Appeals and to vigorously prosecute the appeal in that Court.

Yours very truly,
F. G. AWALT (Signed)
Deputy Comptroller.

[Endorsed]: Filed Jun. 12, 1933. Ed. M. Lakin, Clerk. By E. W. Pettit, Deputy. [39]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL.

COMES NOW the plaintiff and feeling aggrieved at the judgment of the above-entitled Court made and entered on the 13th day of March, 1933, does hereby appeal from said judgment, and each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in its assignment of errors filed herein, and said plaintiff prays that its appeal be allowed and citation issued as provided by law and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit as by law and the Rules of Court provided.

H. P. FISK
JOHN F. McCARTHY
Attorneys for plaintiff.

ORDER ALLOWING APPEAL.

Upon application of the plaintiff, it is

HEREBY ORDERED that the appeal of the plaintiff, The First National Bank of Kelso, Washington, a corporation, by E. B. Benn, its Receiver, to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment herein made and entered on the 13th day of March, 1933, be, and the same is hereby allowed, and it is further ordered that inasmuch as said appeal has been taken under

and by virtue of the express direction of the Comptroller of the Currency of the United States of America said plaintiff be not required to furnish any bond on such appeal.

Done in open Court this 12th day of June, 1933.

EDWARD E. CUSHMAN

Judge.

[Endorsed]: Filed Jun. 12, 1933. Ed. M. Lakin, Clerk. By E. W. Pettit, Deputy. [40]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS ON APPEAL

Comes now the plaintiff and hereby submits its assignment of errors in the above entitled matter, as follows:

I.

That the court erred in ruling in paragraph numbered I of its conclusions of law that the defendant, J. G. Gruver, was acting as an officer and agent of Cowlitz County, Washington at the time he collected and received the fees for automobile licenses referred to in the findings of fact herein and in ruling that said fees and the fees collected by said defendant for hunting and fishing licenses for the counties of Clark and Skamania were Cowlitz County funds.

II.

That the court erred in ruling in paragraph numbered II of its conclusions of law that the purchase

of the drafts referred to in the findings of fact herein constituted a deposit in the plaintiff's bank.

III.

That the court erred in ruling in paragraph numbered III of its conclusions of law that the defendant, J. G. Gruver had the right to sell the school warrants deposited with him by plaintiff bank and to deduct from the proceeds received therefrom the face value of the several drafts referred to in the findings of fact herein.

IV.

That the Court erred in entering a judgment in favor of the defendants.

T. P. FISK
JOHN F. McCARTHY
Attorneys for Plaintiff

[Endorsed]: Filed Jun. 12, 1933. Ed. M. Lakin, Clerk. By E. W. Pettit, Deputy. [41]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the United States District Court of Western District of Washington, Southern Division:

Please prepare and immediately transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a transcript of the record in the above-entitled cause as follows:

1. Complaint.
2. Answer of defendant, J. G. Gruver.
3. Answer of defendant, The American Surety Company of New York, a corporation.
4. Reply to answer of defendant, J. G. Gruver.
5. Reply to answer of defendant, The American Surety Company of New York, a corporation.
6. Waiver of trial by jury.
7. Court's memorandum decision.
8. Findings of Fact and Conclusions of Law.
9. Judgment.
10. Letter from Comptroller of the Currency of the United States directing appeal.
11. Petition for appeal and order allowing appeal.
12. Assignment of Errors.

T. P. FISK
JOHN F. McCARTHY
Attorneys for plaintiff.

Service by copy of the foregoing praecipe is hereby accepted this 16th day of June, 1933.

CECIL B. HALLIN,
of Attorneys for defendant
J. G. Gruver. [42]

Service by copy of the foregoing praecipe is hereby accepted this 15th day of June, 1933.

J. E. STONE
Attorneys for the defendant
The American Surety Company
of New York, a corporation.

[Endorsed]: Filed Jun. 17, 1933. Ed. M. Lakin, Clerk. By. E. Redmayne, Deputy. [43]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing transcript of record consisting of pages numbered from 1 to 43 both inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in the case of The First National Bank of Kelso, Washington, a corporation, by E. B. Benn, Its Receiver, Plaintiff and Appellant vs. J. G. Gruver and The American Surety Company of New York, a corporation, Defendants and Appellees, cause No. 8261, in said court as required by praecipe of counsel filed and of record in my office in said Court at Tacoma, and that the same constitutes the record on appeal from the judgment of said United States Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred and paid by and on behalf of the appellant herein in the preparation of this transcript, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Appeal fee,	$ 5.00
Clerk's fee (Act Feb. 11, 1925) for making record 130 folios @ 15¢ per folio,	19.50
Clerk's certificate,	.50
	$25.00

I do further certify that the cost of preparing record on appeal amounting to $25.00 has been paid to me by the appellant.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of Tacoma, in the Western District of Washington, this 1st day of August, 1933.

[Seal] ED. M. LAKIN, Clerk.
By E. W. Pettit, Deputy. [44]

[Endorsed]: No. 7243. United States Circuit Court of Appeals for the Ninth Circuit. The First National Bank of Kelso, Washington, a corporation, by E. B. Benn, its Receiver, Appellant, vs. J. G. Gruver, and The American Surety Company of New York, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed August 3, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7243

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE FIRST NATIONAL BANK OF KELSO, WASHINGTON, a Corporation, by E. B. BENN, Its Receiver,

Appellant,

vs.

J. G. GRUVER, and THE AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

JOHN F. McCARTHY,
First National Bank Bldg.,
Longview, Washington.
Attorney for Appellant.

No. 7243

United States
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THE FIRST NATIONAL BANK OF KELSO, WASHINGTON, a Corporation, by E. B. BENN, Its Receiver,

Appellant,

vs.

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Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

INDEX

STATEMENT

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Southern Division, in favor of defendants.

Upon written stipulation of the parties, the cause was tried before the court without a jury and special findings of fact were made by the court. It is the contention of the appellant that the judgment in favor of the defendants is not supported by the facts found, but that on the contrary such facts show that the plaintiff is entitled to recover judgment as prayed for in its complaint.

The facts found by the Trial Court, together with its conclusions of law therefrom, are as follows:

FINDINGS OF FACT.

I.

That the First National Bank of Kelso, Washington, at all times mentioned in plaintiff's complaint, was a banking corporation duly organized and existing under and by virtue of the national banking laws of the United States of America and that on the 23rd day of December, 1931, said bank was closed and placed in charge of the Comptroller of Currency of the United States; that on the 29th day of December, 1931, E. B. Benn, was by the

Comptroller of Currency of the United States of America duly appointed receiver of the First National Bank of Kelso, Washington, and immediately qualified as such receiver and took possession of said bank, its assets and property and is and was at all times mentioned in plaintiff's complaint, the duly appointed, qualified and acting receiver of and for said bank, and was duly authorized to begin and prosecute the above entitled cause.

II.

That the above named defendant J. G. Gruver was at all times mentioned in plaintiff's complaint, the duly elected, qualified [30] and acting auditor of Cowlitz County, State of Washington; and that the defendant, The American Surety Company of New York, a corporation, was at all times mentioned in plaintiff's complaint, the bondsman on defendant Gruver's official bond as such county auditor, which said bond was, at all times mentioned in plaintiff's complaint in full force and effect.

III.

That the said defendant J. G. Gruver in the course of his official duties as county auditor of Cowlitz County, Washington, was required to and did collect certain moneys belonging to said Cowlitz County, consisting of marriage license fees, and fees for hunting and fishing licenses for said county, and

that these monies thus collected are the only monies belonging to Cowlitz County which the defendant Gruver retained in his possession.

IV.

That the said defendant Gruver as county auditor was also required to and did receive applications for motor vehicle licenses for the State of Washington, and on behalf of the state collected the fees for such licenses at the time applications were made, for the same, and in addition to the amount of the license fees thus paid, the auditor charged a fee of twenty-five cents for each application, and that such additional fee thus charged belonged to said Cowlitz County to be turned over to the county treasurer of said county; that in receiving applications and collecting the fees for motor vehicle licenses, the said defendant Gruver acted as agent for the State of Washington and the funds so received by him belonged to the State of Washington and were to be remitted daily to the state treasurer of said state.

V.

That the defendant Gruver as part of his official duties [31] as county auditor, at all times mentioned in plaintiff's complaint, issued hunting and fishing licenses for other counties throughout the State of Washington and the fees thus received for such

licenses belonged to such other counties and were remitted to said counties at varying intervals, and where the funds received for such licenses were not remitted immediately, the same were held in the office of the said county auditor of Cowlitz County until the remittances were made.

VI.

That at all times set out in plaintiff's complaint, the said defendant Gruver as county auditor had two checking accounts in the plaintiff bank; one called trust fund account in which only monies received from marriage license fees were deposited and the other called the game fund account, in which only funds received for hunting and fishing licenses from Cowlitz County were deposited, and these two accounts constituted the only accounts that the defendant Gruver had in said bank.

VII.

That for a period of at least six months prior to the closing of said plaintiff bank, it was the custom of said defendant Gruver, as county auditor, to make the remittances of automobile license fees to the state treasurer by draft drawn by the plaintiff bank on the First National Bank of Seattle, and that the remittances to other counties for hunting and fishing licenses issued for such other counties were likewise made by drafts drawn by the plaintiff

bank upon other banks.

These drafts were in every instance purchased by the defendant Gruver as county auditor of Cowlitz County and paid for in currency, silver and checks at the time the same were [32] issued, and that in no instance were any of such drafts purchased or paid for out of the funds which had been on deposit in the bank and in no instance were any of the motor vehicle license funds or outside county hunting and fishing license funds deposited in the bank except the currency, silver or checks deposited by said auditor at the time of receiving the plaintiff bank's draft for same.

VIII.

That during the period from April 1, 1931, to October 1, 1931, the daily balance which said defendant Gruver as auditor had on deposit with said plaintiff bank in the game fund amounted to from $800.00 to $1,800.00 and the average daily balance in said bank in the trust fund account amounted approximately forty dollars.

IX.

That on the 9th day of April, 1931, the plaintiff bank turned over to the defendant Gruver certain school warrants of the total face value of $1503.98 and the terms and conditions under which said

school warrants were turned over to the defendant were set forth in a written instrument which reads as follows:

"Office of
J. G. Gruver,
County Auditor,
Court House,
Kelso, Washington. April 9th, 1931.

RECEIVED of The First National Bank, Kelso, Washington, as security for Cowlitz County funds deposited by me, and to be deposited by me, in such bank, various School District warrants as follows:

School Dist. No.	Warrant No.	Bank's No.	Amount
127	6	2119	$125.00
127	10	2123	123.00
127	16	2122	175.00
127	17	2125	143.00
127	26	2130	150.00
127	29	2137	123.00
127	34	2132	100.25
			[33]
127	40	2153	116.75
127	47	2120	111.00
127	54	2126	87.75
127	64	2146	99.00

School Dist. No.	Warrant No.	Bank's No.	Amount
127	67	2124	99.00
127	81	2121	10.00
127	108	2151	41.23

Total—Fifteen Hundred Three & 98/100 Dollars $1,503.98

Dated at Kelso, Washington, April 9th, 1931.

(Sig.) J. G. Gruver, County Auditor.

It being agreed by and between said plaintiff bank and said defendant Gruver that such warrants were to protect all funds coming into his hands as County Auditor and deposited by him in said bank as such auditor.

X.

That on December 17, 1931, the defendant Gruver as auditor purchased from the plaintiff bank a draft on the First National Bank of Seattle, in the sum of $10.50 payable to the auditor of Skamania county, Washington, and a similar draft in the sum of $1.50 payable to the auditor of Clark county, Washington; and that these drafts were paid for in cash and represented funds received by the defendant Gruver for hunting and fishing licenses issued by him for Skamania and Clark Counties respectively.

XI.

That on December 21, 1931, the defendant Gruver had on hand the sum of $833.00 in the form of silver, currency and checks which had been received by him as auditor in payment of automobile license fees for the state of Washington, and on that date he purchased from the plaintiff bank two drafts drawn on the First National Bank of Seattle and payable to the treasurer of the state of Washington, one being for the sum of $533.00, and the other for the sum of $300, and that these drafts were paid for by the said defendant Gruver in silver, currency and checks. [34]

That at all times the various drafts herein mentioned were issued, plaintiff bank had sufficient funds or credit in the First National Bank of Seattle to pay the same and the same would have been paid had it not been for the closing of plaintiff bank prior to the time the drafts were presented for payment.

XII.

That the last date upon which plaintiff bank did business was December 22, 1931, and that the Comptroller of Currency of the United States took charge of the bank on the morning of the 23rd day of December, 1931, for the purpose of liquidation, and that at the time of the closing of said bank as aforesaid, the defendant Gruver as auditor had on de-

posit in the said bank in the trust fund account and in the game fund account a total balance of $57.71 together with interest thereon amounting to $.70 making a total of $58.41.

XIII.

That after the closing of the plaintiff bank and on or about the 28th day of December, 1931, the defendant Gruver, as auditor, sold the school warrants which had been deposited with him receiving in payment therefor the sum of $1568.59, and after deducting therefrom the amount represented by the balance of his deposit in the trust fund and game fund accounts together with the amount of the drafts herein referred to, tendered the balance amounting to the sum of $680.38 to the Examiner in charge of plaintiff bank, which tender was refused by the Examiner and demand made upon the defendant Gruver for the sum of $1510.18, being the balance of the proceeds of said warrants after deducting therefrom the amount of the balances in the trust and game accounts at the time of the closing of said plaintiff bank, And that after the commencement of this action, the said defendant Gruver as auditor has tendered into [35] Court the sum of $680.38, the same having been paid to plaintiff pursuant to the terms of the stipulation entered into between the parties, and the funds received by said auditor from said bank immediately co-mingled

with the bank's other funds.

Done at Tacoma this 13th day of March, A. D. 1933.

EDWARD E. CUSHMAN,
Judge.

From the foregoing facts found, the court concludes as follows:

CONCLUSIONS OF LAW.

I.

That the said defendant J. G. Gruver was acting as an officer and agent of Cowlitz County, Washington, at the time he collected and received the fees referred to and set out in the Findings of Fact herein, and that as between the State of Washington and the Counties of Clark and Skamania, the monies thus collected by the said defendant Gruver belonged to the State of Washington or to the Counties of Clark and Skamania according to their respective rights as between Cowlitz County and plaintiff bank at the time they were received by plaintiff bank, they were county funds of said Cowlitz County.

II.

That in purchasing the drafts, referred to in the Findings of Fact herein set out, by the said de-

fendant Gruver as auditor of said county, and paying for same with funds representing license fees collected by said defendant Gruver as such county auditor, such funds were deposited with said plaintiff bank upon the delivery of same to said bank and title thereto passed to said plaintiff bank and said bank became a debtor of Cowlitz County in the event of the non-payment of the draft or drafts issued by said plaintiff bank.

III.

That defendant Gruver as county auditor had the right to sell the school warrants deposited with him by plaintiff bank and to deduct from the proceeds received from such sale monies on deposit in said plaintiff bank belonging to Cowlitz County deposited therein by said defendant Gruver as County Auditor and to deduct therefrom the face value of the several drafts referred to in the Findings of Fact herein and to pay the balance of such monies received from the balance of said school warrants to the person or persons in charge of the affairs of said plaintiff bank lawfully entitled to receive same, and that such payment has been made by said defendant Gruver pursuant to a stipulation on file herein.

IV.

That defendants are entitled to a judgment of dis-

missal herein with costs taxed in their favor. [36]

ASSIGNMENTS OF ERROR.

I.

The court erred in ruling in paragraph No. 1 of its conclusions of law (Tr. 43) that the defendant, J. G. Gruver, was acting as an agent and officer of Cowlitz County, Washington, at the time he collected and received the fees for automobile licenses and in ruling that said fees, and the fees collected by said defendant for hunting and fishing licenses for Clark and Skamania counties, were Cowlitz County funds.

II.

The court erred in ruling in paragraph No. 11 of its conclusions of law (Tr. 43) that the purchase of the drafts referred to in the findings of fact herein constituted a deposit.

III.

The court erred in ruling in paragraph No. III of its conclusions of law (Tr. 44) that the defendant had the right to sell the school warrants deposited with him as security and to deduct therefrom the face value of the several drafts referred to in the fiindings of fact herein.

BRIEF OF ARGUMENT.

I.

The defendant, Gruver, at the time he collected the

fees for automobile licenses was the agent of the State of Washington and the fees so collected belonged to the State of Washington and not to Cowlitz County.

Secs. 6314-6316-6317-6327-6330-6360 and 4218, Remington's Revised Statutes of Washington.

State vs. Cowlitz County, 146 Wash. 305;

State vs. Asotin County, 79 Wash. 634;

Smith vs. Seattle School District No. 1, 112 Wash. 64.

II.

The fees collected by the defendant Gruver for hunting and fishing licenses for the counties of Clark and Skamania were not Cowlitz County funds.

Secs. 5884 &5896, Remington's Revised Statutes of Washington.

III.

The purchase of the drafts payable to the Treasurer of the State of Washington and to the auditors of Clark and Skamania counties did not constitute a deposit in the plaintiff bank.

Kidder vs. Hall, 251 S. W. 497; 7 Corpus Juris, 485;

Lankford vs. Schroeder, L. R. A. 1915 F, 623; 3 R. C. L. 516-522.

IV.

Property pledged to secure a particular debt cannot be appropriated to the payment of any other debt or obligation.

21 R. C. L. 653; 49 Corpus Juris, 936; 49 Corpus Juris, 972;

Reynes vs. Dumont, 130 U. S. 345, 32 Law Ed., 934;

Hanover Nat. Bank vs. Suddath, 215 U. S. 110, 54 Law Ed. 115;

Armstrong vs. Chemical Bank, 41 Fed. 234.

V.

Defendant's claim for the amount of the drafts purchased by him cannot be set up by way of recoupment, set-off or counterclaim in the present action.

Scott vs. Armstrong, 146 U. S. 499; 57 C. J. 396, 421 & 426.

Mansfield vs. Yates-American Machine Company, 153 Wash. 345;

In Re Bevins, 165 Fed. 434; Fidelity & Deposit Co. vs. Haines, 23 L. R. A. 652; United States Fidelity & Guaranty Company vs. Wolldridge, 268 U. S. 234; 34 Cyc, 194.

ARGUMENT.

I.

The warrants involved in this action were de-

livered by the Bank to the defendant under a written agreement set forth in paragraph numbered nine of the Court's findings of fact (Tr. 39), which written agreement recites that they were given "as security for Cowlitz County funds deposited by me, and to be deposited by me in such Bank."

The first question that arises, therefore, is whether or not the funds used by the defendant in purchasing the drafts constituted "Cowlitz County funds."

The funds which were used by the defendant in the purchase of the drafts payable to the Treasurer of the State of Washington represnted money collected by him for state motor vehicle licenses and such funds unquestionably were funds belonging to the State of Washington, and Cowlitz County had no interest whatsoever therein.

The law of the State of Washington with respect to the licensing of motor vehicles and the collection of fees therefor, insofar as is material in this case, may be found in the following sections of Remington's Revised Statutes of Washington.

> "The secretary of state, acting through the county auditors of the several counties of the State of Washington as hereinafter provided, shall have the general supervision of the issuing of motor vehicle licenses and of the collecting of

fees therefor" * * * **Sec. 6314, Remington's Revised Statutes of Washington.**

The duties imposed upon the secretary of state by virtue of the above section have since its enactment devolved upon the director of licenses of the State of Washington by the terms of Sec. 6360, which reads as follows:

"The director of licenses, from and after the time when he shall be appointed and qualified and assume and exercise the duties of his office, shall exercise all the powers and perform all the duties by this act vested in and required to be performed by the secretary of state, except the receiving of fees and moneys which shall, from that time, to be paid to the state treasurer who shall transmit his duplicate receipt therefor to the Director of Licenses." **Sec. 6360, Remington's Revised Statutes of Washington.**

It will thus be observed that the county auditor at the time he receives applications for motor vehicle licenses under the provisions of these sections is acting not as an agent of the county, but as an agent of the state of Washington.

"Application for a motor vehicle license shall be made to the secretary of state on blanks furnished by him." * * * **Sec. 6316, Remington's Revised Statutes of Washington.**

"Upon receipt of such application accom-

> panied by the proper fee, the county auditor shall give one copy to the applicant, retain one for the county files, and immediately forward the original, together with the proper fee, to the secretary of state." * * * **Sec. 6317, Remington's Revised Statutes of Washington.**

It is apparent from the section just quoted that it was the intention of the legislature that fees so collected by the county auditors should not be commingled with other fees or funds collected by them, but that the same was the property of the State of Washington and should be transmitted to the state immediately.

> "At the time any application is made to the county auditor for a license, as provided elsewhere in this act, the applicant shall pay to the county auditor the sum of twenty-five cents for each application, in addition to the license fee provided for in section 15 of this act, which fee shall be paid to the county treasurer in the same manner as other fees, collected by the county auditor and credited to the county current expense fund." **Sec. 6327, Remington's Revised Statutes of Washington.**

This section again makes plain that the fees so collected belong to the State of Washington and not to the various counties whose auditors may collect the same, since it specifically provides for an additional fee of twenty-five cents, which additional fee

does belong to the county and must be paid by the auditor to the county treasurer the same as other county funds collected by him.

> "There is hereby created in the state treasury a state fund to be known as the "motor vehicle fund." All fees collected by the state treasurer, as herein provided, shall be paid into the state treasury and placed to the credit of the motor vehicle fund." * * * **Sec. 6330, Remington's Revised Statutes of Washington.**

This section again plainly states that such fees belong to the State of Washington.

It is true that counties are political subdivisions of the state and in a sense agencies of the state for governmental purposes; nevertheless, both the legislature and the courts of the State of Washington have always recognized that the state and its various counties are separate entities insofar as their respective funds and property are concerned. This distinction was recognized by the Supreme Court of the State of Washington in the case of the **State of Washington vs. Asotin County, 79 Wash. 634,** which was an action brought by the state against the county to recover money alleged to be due from the county to the state. In this case the court held that under the facts set forth mandamus against the county commissioners was the proper action, but its opinion clearly indicates that there is a distinction

between state and county funds.

In the case of the **State vs. Cowlitz County, 146 Wash. 305,** the Court held that the state could maintain an action for a money judgment against the county. Counsel for appellant in this case was counsel for Cowlitz County. In that action the question of the right of the state to maintain an action for a money judgment against one of its own political subdivisions was squarely raised and presented to the state court. The fact that an action for a money judgment can be maintained by the state against the county clearly shows that county funds and county property are separate and distinct from state funds or state property.

Under the laws of the State of Washington the county treasurer is the custodian of all county funds and the county auditors are required to turn over to the county treasurers all fees collected by them by virtue of their office.

> "Every county officer, who, by the laws of this state is allowed a salary, shall, on the first Monday of each month, pay into the county treasury all moneys and sums which have come into his hands for fees and charges in his office, or by virtue of his office, during the preceding month. And no officer is permitted to retain to his own use or profit any sums paid him in his office or by virtue of his office, no matter from what

> source, but all of such moneys so paid him by virtue of the laws of this state, or of the United States, shall be the property of the county." **Sec. 4218, Remington's Revised Statutes of Washington.**

If it were to be held in this case that the fees collected by the county auditor for motor vehicle licenses belong to the county, then the express declaration of the legislature would be set at naught.

The learned Trial Court in his memorandum opinion seems to have based his conclusions, partly at least, upon the theory that the duty of collecting and remitting these fees was one which rested upon the counties and that the funds so collected therefor were county funds. There is, we believe, no foundation for such an assumption. The law plainly states that the duty of collecting such fees rests upon the director of licenses of the State of Washington, acting through the county auditors of the various counties. A county auditor occupies a dual capacity. He is not only an agent of the county but he is, also, by virtue of his office an officer and agent of the state itself.

> * * * "An officer whose duties are prescribed by statute, whose authority is not derived from the corporation, and who is not subject to its control, is not its agent for whose negligence it is liable. Shearman & Redfield on Law of Neg-

ligence (6th ed.), vol. 2, sec. 291; Northwestern Improvement Co. vs. McNeil, 100 Wash. 22, 170 Pac. 338; Township of Vigo vs. Com'rs Knox County, 111 Ind. 170; 12 N. E. 305; Dillon on Municipal Corporations (5th ed.), vol. III, sec. 974; Thompson on Negligence, vol. 5, secs. 5818 and 5822; Dillon on Municipal Corporations (5th ed.), vol. IV, secs. 1640 and 1655.

The county superintendent being, therefore, a public officer, and not a municipal agent or employee, whatever may be his liability in such case as this, the county has no liability under the maxim respondeat superior." * * * **Smith vs. Seattle School District No. 1, 112 Wash. 64.**

In this case if the county auditor had collected fees for automobile licenses and had neglected or refused to transmit the same to the state treasurer the county would be under no liability whatsoever to the state for such funds, but the state would have to look to the auditor himself or to his official bond for reimbursement. So, too, in such a case the county would have no interest whatsoever in the matter. It could not maintain an action against the auditor or his bondsmen to recover any monies so withheld. We believe that there can be no question but that the funds here in question did not constitute county funds and can under no circumstances be considered as being secured by the property pledged by the bank.

II.

With respect to the fees collected by the defendant for hunting and fishing licenses for the counties of Clark and Skamania, it is equally clear, we believe, that such fees did not belong to Cowlitz County. The power of the county auditor to issue such licenses and his duties with respect to the fees collected therefor are found in **Sections 5884 and 5896, Remington's Revised Statutes of Washington,** which read as follows:

> * * * "There is hereby established in each county treasury a fund to be known as the county game fund, which shall consist of ninety per cent (90%) of all moneys received in any county from the sale of county licenses and twenty per cent (20%) of all moneys received from the sale of state licenses and all moneys received from fines and costs for violations of this act. Such county game fund shall be used for the payment of the salaries and expenses of employees of the county game commission, and for propagation, protection, introduction, exhibition, purchase and distribution of game animals, fur-bearing animals, game birds, nongame birds or game fish." **Sec. 5884, Remington's Revised Statutes of Washington.**
>
> "Any county auditor shall have the power and authority to issue hunting and fishing licenses for any county of the state, and shall transmit the fees to the auditor of the county for which

> the license is issued at the close of each month's business, together with the record thereof" * * * **Sec. 5896, Remington's Revised Statutes of Washington.**

The defendant in this action in issuing and collecting fees for licenses in other counties was clearly acting as the agent of such other counties and not as the agent of Cowlitz County and the fees received for such licenses belonged to the other counties and not to Cowlitz County.

III.

As we have seen, the warrants involved were pledged by the bank as security for Cowlitz County funds "deposited by me, and to be deposited by me in such bank." We cannot see how by any stretch of the imagination the purchase of these drafts can be construed as a deposit in the bank. The term deposit is so well understood that so far as we have been able to discover no court has as yet found it necessary to make a legal definition of the term. The various characteristics of a deposit in a bank have, however, been passed upon many times and it is generally understood and held that a deposit consists of a sum of money placed in a bank to the credit of the depositor and subject to be withdrawn by him, or on his order, on demand. When we say that a man has funds on deposit in a bank we mean that he has placed in the bank money which the bank

will re-pay to him upon demand.

A general discussion of the creation of the relation of banker and depositor is found in **3 R. C. L. pp. 516 to 522.** In legal effect a deposit is a loan to the bank. It differs from an ordinary debt in that it is constantly subject to the checking of the depositor and always payable on demand. The consideration which the depositor receives for his money is the absolute and unconditional contract by the bank to pay his checks to the extent of his deposit. A deposit creates the relation of debtor and creditor between the bank and the depositor.

An entirely different situation exists between the purchaser of a draft and the bank from whom the same is purchased. It is true that a draft creates the relation of debtor and creditor, but a draft is a negotiable instrument and is drawn not upon funds in the drawer bank, but upon a credit which the drawer has in another bank, and the relation of debtor and creditor in this case did not exist between the bank and the defendant, but between the bank and the payee of the drafts. When the defendant in this case purchased the drafts in question he did not make a deposit in the bank, but he purchased the credit of the bank and title to this credit passed not to the defendant but to the payee of the drafts. No relation of debtor and creditor existed between the bank and the defendant Gruver until the drafts had been

dishonored and the relation then arose only by virtue of his payment to the state treasurer of the amount of the drafts and his consequent subrogation to the rights of the state treasurer as payee.

The distinction between a depositor and the holder of a check or draft has been clearly pointed out in cases arising under statutes providing for a depositors' guaranty fund. The authorities in such cases have held that in order to be entitled to payment of such fund the claimant must be a depositor as the term is generally accepted and understood. **7 Corpus Juris, p. 485; Lankgord vs. Schroeder, L. R. A. 1915 F., 623.** A rather thorough discussion of the subject is found in the case of **Kidder vs. Hall, 251 S. W. 497,** in which the court says:

> "Aside, however, from the technical question of jurisdiction, it is plain relator's claim is not based upon a noninterest-bearing and unsecured deposit, the only class of obligations protected by the depositors' guaranty fund. Revised Statutes, art. 486. The word 'Depositors' is to be given its generally accepted and understood meaning. 7 Corpus Juris, p. 485; Lankford vs. Schroeder, 47 Okl. 279, 147 Pac. 1049, 1053 L. R. A., 110 N. W. 538. A depositor is one who delivers to or leaves with a bank money, or checks or drafts, the commercial equivalent of money, subject to his order, and by virtue of which action the title to the money passes to the bank.

2 Michie on Banks and Banking, pp. 887 to 890, pp. 908, 909, and notes; Fleming vs. State, 62 Tex. Cr. R. 653, 139 S. W. 598, 600; Lankford vs. Schroeder, 47 Okl. 279, 147 Pac. 1049, 1052, L. R. A, 1915 F, 623; State vs. Corning State Bank, 136 Iowa, 79, 113 N. W. 600, 502.

"Various distinctions may be noted between the relationship created by the issuance and sale of a draft, and the receipt of a deposit by a bank. In the case of a deposit, the money is placed in the bank in reality for the benefit of the depositor (Elliott vs. Capital City State Bank, 128 Iowa, 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 1134, 111 Am. St. Rep. 198) while in the sale of a draft the transaction is for the benefit of the bank making the sale. When a deposit is made the bank receives assets, and the depositor has a direct claim against the bank; the relationship is one of primary liability, directly on the contract—while in the issuance of a draft the bank sells assets, and the primary liability is that of the bank against which it is drawn, and the issuing bank is not liable until payment has been refused by the drawee bank. See Texas Negotiable Instruments Act, tit. 1, arts. 5 to 8; Vernon' Ann. Civ. St. Supp. 1922, vol. 2, pp. 1772 to 1779; Harper vs. Winfield State Bank (Tex. Civ. App.) 173 S. W. 627.

"Another illustration may be given. Take the instance where money, belonging to another than the one making the deposit, is placed in a

bank without the consent of the owner. In such a case the relation of banker and depositor is not created: the bank does not take title to the fund, and, regardless of the innocent purposes of the bank, it is guilty of conversion. 2 Michie on Banks and Banking, pp. 897, 898, 899; Winslow vs. Harriman Iron Co. (Tenn. C h. App) 42 S. W. 698, 699; Mingus vs. Bank of Ethel, 136 Mo. App. 407, 117 S. W. 6683, 685; Board of Fire and Water Commissioners vs. Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; Patek vs. Patek, 166 Mich. 466, 131 N. W. 1101, 35 L. R. A. (N. S.) 461. See, also, Wilson vs. Wichita Co. 67 Tex. 647, 4 S. W. 67, and 3 Rose's Notes on Texas Rep. p. 810, and 1913 Supplement, p. 548. On the other hand, if one having the money of another goes to a bank and purchases a draft, and the bank innocently receives the money and issues a valid draft therefor, the bank becomes the owner of the money paid for the draft, regardless of the title which the purchaser may have had to the funds. Oklahoma State Bank vs. Bank of Central Arkansas, 120 Ark. 369, 179 S. W. 509, 511; First National Bank vs. Gilbert, 123 La. 845, 49 South, 593, 25 L. R. A. (N. S.) 6631, 131 Am. St. Rep. 382, an dcases cited in notes; State Bank vs. United States, 114 U. S. 401, 5 Sup. Ct. 888, 29 L. Ed. 149; Holly vs. Missionary Society, 180 U. S. 284, 293, 21 Sup. Ct. 395, 45 L. Ed. 531; 27 Cyc. pp. 863, 865.

"The illustrations show a clear distinction between the obligations and rights which arise

from contracts of deposit and of sale and purchase of drafts. Others might be stated, but we deem it unnecessary." **Kidder vs. Hall, 251 S. W. 497.**

IV.

As we have heretofore seen, the drafts for the payment of which the defendant seeks to hold the proceeds of the pledged property were not purchased with county funds, nor did the purchase of these drafts constitute a deposit in the bank. The question now arises as to whether or not the defendant can hold the pledged property, or the proceeds, for the payment of a debt or obligation other than that for which the security was given. The authorities on this question are so universally unanimous and the rule is so well known that we deem it hardly necessary to argue this point very extensively.

"Debts or Liabilities Secured.—A pledge to secure a specific debt cannot be held by the pledgee as security for any other obligation, whether such obligation exists at the time of the pledge or accrues afterwards, except by express agreement between the pledgor and pledgee. If the purpose for which the collateral security was given is expressed in writing, such writing is not subject to be varied or contradicted by parol evidence for the purpose of showing that the collateral may be held to secure some other in-

debtedness not mentioned in the writing.' * * * **21 R. C. L. 653.**

"Debts or Liabilities Secured.—a. In General. As to what debts or liabilities are secured by a pledge is controlled by the intention of the parties, as determined from the whole transaction between them; and where the contract, prepared by the pledgee, is not clear as to whether the collateral pledged shall secure a particular indebtedness, it must be construed in favor of the pledgor. It is a well settled rule, however, that, where the contract shows that the collateral or property is pledged as security, for a specific debt or liability, the pledgee has no lien upon it for a general balance or for the payment of other claims; and therefore the collateral or property so pledged cannot be appropriated by the pledgee to any other debt or liability of the pledgor, regardless of his insolvency," * * * **49 C. J. 936.**

A general discussion of this question may also be found in the following cases:

Reynes vs. Dumont, 130 U. S. 354, 32 Law Ed., 934;

Hanover Nat. Bank vs. Suddath, 215 U. S. 110, 54 Law Ed. 115;

Armstrong vs. Chemical Bank, 41 Fed. 234.

V.

The next question that arises is whether or not the

defendant has the right to set up by way of recoupment or set-off in this action any claim he may have by reason of the non-payment of the drafts. If such claim is merely a general claim against the bank, which it undoubtedly is, then unquestionably the same cannot be set up by way of recoupment, set-off or counter-claim in this action.

Assuming for the moment that the circumstances existing at the time of the purchase of these drafts were such as to entitle the defendant to a preferred claim in the receivership proceedings, it is, we believe, well established that such claim cannot be set up by way of recoupment, set-off or counter-claim in the present action. This is an action at law and is based upon the conversion of certain property by the defendant, which conversion took place subsequent to the suspension of the bank and subsequent to the time the same was turned over to the Comptroller of the Currency for the purpose of liquidation. The right of set-off or counter-claim was unknown in common law and exists purely by virtue of statute. So far as we have been able to discover there is no statute in the United States which confers the right of set-off or counter-claim in an action at law, and the Supreme Court of the United States has expressly held that a District Court of the United States sitting as a court of law cannot permit an equitable set-off or counter-claim in an action at

law, even though under the code of procedure for the state in which the Court is sitting such equitable defenses may be pleaded in actions brought in the state court.

> "Section 913 of the Revised Statutes in providing that the practice, pleadings, and forms and modes of proceeding in civil causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction **between law and equity as under the Constitution matter of substance,** as well as of form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, **nor are equitable defenses permitted.** Bennett vs. Buterworth, 52 U. S. 11 How. 669 (13:859); Thompson vs. Central Ohio R. Co. 3 U. S. 6 Wall. 134 (18:765) Scott vs. Neely, 140 U. S. 106 (35:358); Montejo vs. Owen, 14 Blatchf, 324; La Mothe Mfg. Co. vs. Natural Tube Works Co. 15 Batchf, 432.
>
> We are of opinion that the circuit court had no power to grant the set-off in question in the suit at law." **Scott vs. Armstrong, 146 U. S. 499.**

It is, therefore, at once apparent in view of the

rule in the above case that the claims of the defendant in this action cannot be allowed unless it would be on the theory of recoupment, which is the only defense of this character recognized in actions at law in the United States courts. The right of recoupment, however, exists only in cases where the facts constituting the defense arise out of the same transaction as that upon which the plaintiff's action is based.

> "Sec. 49. F. **Arising Out of Transaction — 1. Necessity and Propriety—a. Recoupment.** In recoupment defendant's claim must arise out of the same contract or transaction as that on which plaintiff's cause of action is founded, or be connected with the subject of the action. Thus, if defendant's claim springs out of the contract or transaction on which plaintiff seeks recovery, it may be recouped, but defendant cannot recoup for matters not connected with the subject matter of plaintiff's claim, and which are founded upon an independent and distinct contract or transaction." **57 Corpus Juris, p. 396.**

In this case, as we have seen, the plaintiff's cause of action arises out of, and is based upon, the conversion of its property by the defendant. The warrants which were converted were turned over to the defendant prior to the time the drafts were issued and the conversion took place after the insolvency of the bank and after the drafts had been dishonored

for that reason. There certainly cannot be said to be any connection whatsoever between the issuance of the drafts and the conversion of the warrants; they were entirely separate and distinct transactions.

Moreover, even in those courts in which the defenses of set-off and counter-claim are allowed by virtue of statutory provisions the rule is well settled that set-offs or counter-claims arising by virtue of contract cannot be allowed in actions arising out of a tort.

> "In accordance with the general rule that excludes set-off in actions sounding in tort, in the absence of statutes permitting it, a claim on a contract is not allowable to defendant as a set-off to a claim based on a tort; and this applies to claims founded on implied contracts as well as express ones." **57 Corpus Juris, 421.**

> "Where it arises out of the transaction upon which plaintiff's cause of action is based, or is connected with the subject of plaintiff's action, a demand based on contract may be counter-claimed against a claim founded on tort, but where these essential requisites are absent, such a counter-claim is improper, and thus counter-claims ex contractu have been disallowed in actions for conspiracy, conversion, fraud, negligence, trespass, wrongful arrest, or for wrongful diversion of a stream. Where plaintiff's action sounds in tort, no counter-claim can be al-

> lowed under a statute permitting the counter-claiming of any demand arising out of contract, in an action based on a contract. Nor can a contract be the basis of a counter-claim in a tort action under a statute allowing defendant, in an action sounding in tort, to counter-claim a similar cause of action." **57 C. J. 426.**

Moreover, the cause of action upon which the claim of the plaintiff in this case is based did not come into existence until after the insolvency of the bank and after it had been taken over by the Comptroller of the Currency for liquidation. The rule is well settled in cases of this kind that the rights of the receiver, or other officer who has been placed in charge of an insolvent corporation, and the rights of the creditors or debtors of such corporation with respect to off-sets and counter-claims are fixed and determined at the time the act of insolvency occurs and that no creditor can obtain a preference over the other creditors by appropriating any of the property of the corporation subsequent to the occurrence of the act of insolvency, and in case any creditor shall convert or appropriate to his own use property of an insolvent corporation after the appointment of a receiver he is liable in an action for conversion and he cannot set up the indebtedness owing to him by the corporation as a defense in an action brought by the receiver for the recovery of the property or the value thereof.

"Appellant also claims the right to off-set against the judgment obtained in this action the balance due it from the corporation on account of the purchase price of the machines. It must be remembered, however, that the receiver in this case represents the creditors, and the claim of the receiver in this action is a claim arising subsequent to his appointment and because of goods converted from him, clearly distinguishing the situation from that in the North Side State Bank vs. United States Fidelity & Guaranty Co., 127 Wash., 342, 220 Pac. 822, the case relied upon by appellant. To permit the appellant to off-set in this action would be to grant to the appellant all the rights which he might have obtained had his conditional sales contract been held good and valid. Cases, seemingly squarely in point on this phase of the situation, which hold that the set-off will not be allowed, have been examined, among them being: McQueen vs. New(86 Hun 271, 33 N. Y. Supp. 395; Singerly vs. Fox, 75 Pa. St. 112; Rochester Tumbler Works vs. Mitchell Woodbury Co., 215 Mass., 194, 102 N. E. 428; Washburn Water Works Co. vs. City of Washburn, 218 N. W. (Wis.) 825.

We find no error in the record. The judgment is therefore affirmed." **Mansfield vs. Yates-American Machine Co., 153 Wash. 345.**

See, also, **In re Bevins, 165 Federal 434, Fidelity & Deposit Co. vs. Haines, 23 L. R. A., 652**; also, **United States Fidelity & Guaranty Company vs. Wool-**

dridge, 268 U. S. 234.

If any cause of action in favor of the defendant exists by reason of the non-payment of the drafts in controversy, the same accrued and came into existence at the time of the closing of the bank, or at least not later than the time the drafts were presented and payment refused. At that time the receiver of the bank or the Comptroller of the Currency had no cause of action against the defendant and the defendant was not indebted to the bank in any manner whatsoever. No cause of action in favor of the bank or its receiver arose until approximately a week after the closing of the bank, at which time the act of conversion took place.

> "While the cases are not entirely harmonious on this subject, yet upon the principle last stated, and because the receiver can acquire no greater interest than the debtor had in the estate, the general rule may be said to be that the appointment of a receiver does not affect a right of set-off **then existing**; choses in action pass to him subject to the equitable right of **set-off** then existing, so that a debtor of the insolvent who has such right is not bound to pay what he owes and take his chances with the other creditors, but is bound to pay only the balance. But the right of set-off in such cases exists only to the extent of the concurrence of the two claims. No lien can be obtained against the receiver for any

excess due defendant, and to entitle a debtor of an insolvent corporation to offset his claim against the receiver in a case not provided for by the statute, his natural equity to have one claim compensate or discharge another must be superior to any equitable claim which can be urged in favor of those parties for whose benefit his claim to an equitable offset is resisted. **The debts must have been due to and from the same persons in the same capacity in order that the right of set-off may exist, and as against a receiver as the representative of the creditors of an insolvent, a claim against the latter cannot be set off, and where the receiver of a corporation** as the representative of creditors, repudiates an illegal transfer of corporate assets before his appointment, the transferee cannot set up a counter-claim arising out of his own illegal contract for money paid in pursuance of it. **Claims acquired after insolvency,** where the statute prohibits references and assignments after insolvency, or after the appointment of a receiver, cannot be set off against him. And where the rights of the receiver become fixed at the time of his appointment, the rights of creditors to an equal distribution of the assets of an insolvent cannot be disturbed by permitting a debtor to acquire a claim against the insolvent after the appointment of a receiver and to accomplish a set-off, this acquiring a preference to that extent, and the assignment of a claim against an insolvent corporation after the appointment of a receiver will not affect the receiver's right to

> set off against it claims which he holds against the assignor. So it is held that a claim against an estate before the receivership **cannot be set off against a claim accruing to the receiver after his appointment.**" * * * **34 Cyc. p. 194.**

From the authorities which we have hereinabove quoted it is, we believe, apparent that if the defendant has any claim by reason of the non-payment of the drafts involved in this action the same must be presented in the receivership proceedings and cannot be passed upon or allowed in this action.

In conclusion we submit:

1st. That the funds used by the defendant Gruver in purchasing the drafts payable to the Treasurer of the State of Washington and to the auditors of Clark and Skamania counties were not Cowlitz County funds and, therefore, not secured by the pledged property;

2nd. That the purchase of said drafts by the defendant Gruver did not constitute a deposit in the bank and that the sums paid for said drafts were, therefore, not secured by the pledged property;

3rd. That the warrants pledged to the defendant Gruver, or their proceeds, can be held only for the amount of money actually on deposit in the bank at the time of its closing and cannot be applied to the

payment of the indebtedness or obligation arising out of the dishonor of the drafts;

4th. That any claim against the bank arising out of the dishonor of the drafts must be presented to the receiver of the bank in the regular course of liquidation and cannot be set up by way of recoupment, set-off or counter-claim in this action.

Respectfully submitted,

JOHN F. McCARTHY,
Attorney for Appellant.

No. 7243

United States
Circuit Court of Appeals
For the Ninth Circuit

THE FIRST NATIONAL BANK OF KELSO, WASHINGTON, a Corporation, by E. B. BENN, its Receiver, *Appellant,*

v.

J. G. GRUVER, and THE AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, *Appellee.*

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

STATEMENT OF CASE.

As indicated by the Honorable Trial Court in its memorandum decision rendered and filed in this case, there is no substantial dispute between appellant and appellee as to the facts involved in this action. It is to be noted that appellant in its brief assigns no error on the part of the Honorable Trial

Court so far as the facts found are concerned, but contends that on the facts as found by the Trial Court error was committed in its conclusions of law. At all times mentioned in the pleadings in this case and as found by the Trial Court, the appellee Gruver was auditor of Cowlitz county, Washington, and as such county auditor under the statutes of the State of Washington, was charged and required in connection with the performance of his other official duties to receive applications for motor vehicle licenses and to collect the fees provided therefor, and as county auditor under the statutes of the state, was also required to issue hunting and fishing licenses for counties other than Cowlitz county located within the boundaries of the state. The two particular counties involved in this action being the counties of Clark and Skamania.

At the times involved in this action, appellee Gruver, as county auditor, carried two checking accounts in appellant, the First National Bank of Kelso. One of these accounts was denominated as "trust fund," and in this account only moneys received from the issuance of marriage licenses fees were deposited. The other account was denominated "Game Fund," and in this account funds received from hunting and fishing licenses from Cowlitz county were deposited. These two accounts constituted the only accounts so far as the evidence shows which appellee Gruver ever carried in the appellant bank.

The facts, as shown by the evidence and as found by the Honorable Trial Court, further show that for a period of at least six months prior to the closing of the appellant bank, it was the custom of the appellee Gruver as county auditor to make remittances of automobile license fees theretofore collected by him to the state treasurer by drafts drawn by appellant bank on the First National Bank of Seattle, and to make remittances to other counties in the state for hunting and fishing licenses, issued by appellee Gruver for such other counties, which remittances were likewise made by drafts drawn by appellant bank upon other banks. In all instances these drafts were purchased by appellee Gruver as county auditor of Cowlitz county and paid for in silver, currency and checks at the time the same were issued. (T. of R., pages 24, 25 and 26.)

The record shows and the Trial Court found, that on the 9th day of April, 1931, the appellant bank turned over to appellee Gruver certain school warrants of the total face value of $1,503.98. These school warrants thus turned over were identified as to the district number, warrant number and amount of each warrant by a certain written instrument bearing date of April 9, 1931, which written instrument was in part in the words and figures as follows:

"Office of J. G. Gruver, county auditor, court house, Kelso, Washington, April 9, 1931. Received of the First National Bank of Kelso, Washington, as security for Cowlitz County funds deposited by

me and to be deposited by me in such bank, various school district warrants as follows: (Here follows description of warrants). Total $1503.98 (In words and figures). Dated at Kelso, Washington, April 9, 1931. J. G. Gruver, County Auditor." (T. of R., pages 27 and 28.)

The evidence in the case further showed and the Trial Court found that on December 17, 1931, the appellee Gruver purchased from appellant bank a draft on the First National Bank of Seattle in the sum of $10.50 payable to the auditor of Skamania county, Washington, and a similar draft for the sum of $1.50 payable to the auditor of Clark county, Washington. These drafts were paid for in cash by appellee and represented funds received by him as county auditor for hunting and fishing licenses issued by him as county auditor of Cowlitz county for Skamania and Clark counties respectively. The evidence in the case further shows and the trial court found that on December 21, 1931, the appellee Gruver had on hand as county auditor the sum of $833 in the form of silver, currency and checks which had been received by him as county auditor in payment of automobile license fees issued for the State of Washington, and on that day he purchased from appellant bank two drafts drawn on the First National Bank of Seattle and payable to the treasurer of the State of Washington, one being in the sum of $533 and the other in the sum of $300. These drafts were paid for by appellee Gruver with cash, currency and checks which he had collected upon the

issuance of same. At the time these several drafts were issued, the appellant bank had sufficient funds or credit in the First National Bank of Seattle to pay the same upon presentation, and the same would have been paid had it not been for the closing of appellant bank prior to the time the drafts were presented for payment.

The evidence shows and the Trial Court found, that the last date on which appellant bank did business was December 22, 1931, and that the Comptroller of Currency of the United States took charge of the bank on the morning of the 23rd day of December, 1931, for the purpose of liquidation. At the time of the closing of appellant bank, appellee Gruver had on deposit in the bank in the trust fund account and in the game fund account, a total balance of $57.71 together with accrued interest thereon amounting in all to seventy cents making a total of $58.41.

After the closing of appellant bank and on or about the 28th day of December, 1931, the record shows that appellee Gruver sold the school warrants which had been deposited with him and received in payment therefor the sum of $1,568.59. That from the sum thus received, the appellee deducted the amount represented by the balance of his deposit in the trust fund and game fund together with the amount of the drafts theretofore purchased, and tendered the balance amounting to the sum of $680.38

to the examiner in charge of appellant bank. This tender was refused by the examiner and demand was made upon the appellee Gruver for the sum of $1510.18, the same being the balance of the proceeds of said warrants after deducting therefrom the amount of the balances in the trust and game accounts at the time of the closing of the bank. By stipulation, the sum of $680.38 tendered by appellee Gruver was paid to the examiner in charge of the appellant bank, it being agreed, however, that the acceptance of same should not prejudice the appellant's right to recover any additional sum which the court might find owing to appellant.

ARGUMENT.

The first assignment of error and the first question discussed by appellant in its brief is that the Trial Court erred in holding that appellee Gruver at the time he collected and received the fees for automobile licenses was acting as an officer and agent of Cowlitz county, Washington, and that at the time he collected and received the fees for hunting and fishing licenses for Clark and Skamania counties, and that such fees constituted Cowlitz county funds. In other words, the question is, were the funds used by appellee Gruver in the purchasing of the several drafts "Cowlitz County funds," so that appellee Gruver was protected by the pledge of the school warrants turned over to him by the appellant bank as and for security. We think that in the discussion of this phase of the case as indicated in appellant's brief, appellant has lost sight of the real issue in the case. This is not a contest waged as between the State of Washington and appellee Gruver or the counties of Skamania and Clark against appellee Gruver to determine the character of these particular funds, but it is a case waged as between the receiver of appellant bank and appellee Gruver as to the character and status of these particular funds. As indicated by the memorandum decision of the Honorable Trial Court, while appellee Gruver as auditor of Cowlitz county may have been in one sense the agent of the state and of the counties of Clark and

Skamania in the matter of collecting these funds, he was also the agent of Cowlitz county.

That while as between Cowlitz county and the State of Washington or between Cowlitz county and the counties of Clark and Skamania, the funds in question belonged to the state and to the counties of Clark and Skamania, as between Cowlitz county and appellant bank at the time they were received by the bank, they were funds of Cowlitz county. At this point, we wish to call the Court's attention to the finding of fact number nine made by the Honorable Trial Court, and to which finding of fact no error is assigned by appellant in this case, which reads:

"It being agreed by and between said plaintiff bank and said defendant Gruver that such warrants were to protect all funds coming into his hands as county auditor and deposited by him in said bank as such auditor."

The evidence in the case given by the appellee Gruver fully justified the Trial Court in making this finding, and we think and contend that it was the intent and purpose of all parties at the time of the delivery by appellant bank to appellee Gruver of the school district warrants as evidenced by the receipt bearing date of April 9, 1931, to protect and secure appellee Gruver as county auditor for all funds deposited by him as auditor in the appellant bank.

If this be true, and the Honorable Trial Court found it to be a fact, then it is quite beside the case to determine whether strictly speaking the funds

were Cowlitz county funds or not. To give this written receipt the strict construction contended for by appellant in this case, would, we think, defeat the very purpose for which it was given.

The Supreme Court of the State of Washington in the case of *State ex rel. Port of Seattle v. Gaines,* 109 Wash. 196, discusses at some length what is meant by the term "county moneys" as that term is used in connection with depositaries for county funds. In the course of its opinion, the Supreme Court of the State of Washington said:

"We think the legislature used the words 'county moneys in his hands or under his official control' in the sense that any public moneys required to be held by the county treasurer become, for the purpose of keeping and handling the same, moneys of the county, and that such words had reference to any public moneys for which the county and its officials are by law responsible."

Under the law of the State of Washington it was clearly the official duty of appellee Gruver as county auditor of Cowlitz county to receive applications for motor vehicle licenses and to collect the statutory fee therefor. There is no dispute on this point between appellant and appellee in this case. It was equally the duty of the appellee Gruver as auditor of Cowlitz county to issue fishing and hunting licenses for other counties within the state and to collect the fees therefor. There is no dispute between appellant and appellee on this point. And we contend that under the logic of the holding of the

Supreme Court of the State of Washington in the *Gaines* case *supra,* Cowlitz county and appellee Gruver as auditor thereof, being responsible therefor, such moneys became, for the purpose of keeping and handling same, the moneys of Cowlitz county, and as such were within the protection of the security given by appellant bank in the form of the school warrants deposited with him under date of April 9, 1931. It may be admitted on all hands, we think, that a county is a municipal corporation and an agent of the state. *(Constitution of the State of Washington, Art. 11, sec. 4-12 inclusive.) Lincoln County v. Brock,* 37 Wash. p. 14. *Art. 11, sec. 5, of the Constitution of the State of Washington* provides in part as follows:

"And it (state legislature) shall provide for the strict accountability of such officers for all fees which may be collected by them and for all public moneys which may be paid to them, or officially come into their possession."

There can be no question in this case and we think no contention is made, but that the moneys paid to appellee Gruver as county auditor and involved in this case were received by him in his official capacity and no contention is made but that such moneys constituted public moneys.

Under the provisions of sec. 9930, Rem. Comp. Stat., of the State of Washington, official bonds of all county officers run to the state. And so we say, as was held by the Honorable Trial Court in this

case, that these funds in dispute constituted county funds as between the appellant bank and appellee Gruver as county auditor, and he as county auditor and Cowlitz county being responsible therefor, we say, as the Supreme Court of the State of Washington said in the *Gaines* case *supra,* that these funds having come into the hands of the appellee Gruver as county auditor lawfully, and being public moneys, that for the purpose of keeping and handling the same, they became moneys of Cowlitz county.

Did the Drafts Purchased by Appellee Gruver Constitute a Deposit in Appellant Bank?

On this phase of the case, the Honorable Trial Court in its memorandum decision held that while

"It may be conceded that were the transaction one between the bank and the ordinary bank customer with a checking account therein it would not, under the circumstances, be a deposit, but in view of the strict accountability to which county officers are held in handling public money and particularly in view of the constitutional provisions above quoted, these funds were 'deposited with the bank.' Upon their delivery by the auditor to the bank, title passed to the bank and the bank became the debtor in case of non-payment of the bank, a debtor subject to suit either by the county or its auditor when paid by them. Such drafts in so far as effect and principle are concerned, were not essentially different from demand certificates of deposit."

The Trial Court cited the case of *Reynes v. Dumont,* 130 U. S. p. 354, as authority sustaining the court's view of this phase of the case. At page

28 of appellant's brief, counsel for appellant state: "A deposit creates the relation of debtor and creditor between the bank and depositor." We concede that this is sound law. It is equally sound law that the purchase of a bank draft creates the relation of debtor and creditor between the bank and the purchaser.

Morse on Banks and Banking, Vol. 3, p. 316;
Leach v. City Commercial Savings Bank of Mason City, 212 N. W. p. 746.
Standard Oil Co. v. Veigel, 219 N. W. p. 863;
Leach v. Battle Creek Savings Bank, 211 N. W. p. 527;
Spiroplos v. Scandinavian-American Bank, 116 Wash. p. 491, 16 A. L. R. p. 181.

In the *Scandinavian-American Bank* case *supra,* which seems to be a leading case on this subject, the Supreme Court of the State of Washington cited with approval the case of *Jewett v. Yardley,* 81 Fed. p. 920, wherein it was held that the relation between the bank and the holder of drafts issued by it was that of debtor and creditor, and the Supreme Court of the State of Washington specifically held in the *Scandinavian-American Bank* case *supra,* "that the relation between Spiroplos and the Scandinavian-American Bank, after the transaction of the purchase of the drafts, was that of debtor and creditor."

So it would seem in this case, that there can be no escape from the legal conclusion under the facts in the case, that the purchase of the drafts by ap-

pellee Gruver as county auditor from the appellant bank created as between Gruver and the bank the relationship of debtor and creditor, and that the drafts being purchased with Cowlitz county funds, these funds were, as held by the Trial Court, deposited with the bank and were protected to the same extent by virtue of the school warrants which had theretofore been turned over by the appellant bank to appellee Gruver to secure deposits of county funds as were any moneys actually on deposit in such funds at the time the bank was taken over by the Comptroller of Currency for liquidation.

WOULD APPELLEE GRUVER BE ENTITLED TO PLEAD AND RECOVER IN THIS ACTION THE AMOUNT PAID FOR THE DRAFTS ON THE THEORY OF SET-OFF AND COUNTERCLAIM?

The Honorable Trial Court having concluded in its memorandum decision that the drafts in question were purchased with Cowlitz county funds and that such drafts constituted deposits in appellant bank held that: "Discussion of other questions argued is not necessary." Counsel for appellant, however, devotes considerable space in his brief to the discussion of this phase of the case. Under the facts as found by the Trial Court, the claim of appellee Gruver undoubtedly, in any event, would constitute a preferred claim against the assets of appellant bank, it being admitted that Gruver had theretofore paid the state and the counties of Clark and Ska-

mania the several sums represented by the several drafts. We think this phase of the case is controlled by the express provision of the statutes of the State of Washington.

Section 265, Rem. Comp. Stat. of the State of Washington, reads as follows:

"The counterclaim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"1. A cause of action arising out of the contract, or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action;

"2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

Section 266, Rem. Comp. Stat., of the State of Washington, reads as follows:

"The defendant in a civil action upon a contract expressed or implied, may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was

originally liable, or such assignee while the contract belonged to him."

Both of these demands arise out of the same transaction and both arise on contract, either expressed or implied and both existed at the time of the commencement of this action. It is well settled that a set-off may be pleaded as a defense to an action brought to the United States Courts in any state where that plea is permissible by the laws of the state.

Frick, et al. v. Clements, et al., 31 Fed. 542;
Charnney v. Sidley, 73 Fed. 980;
Dotson v. Kirk, 180 Fed. 14;
Payne v. Clark, 271 Fed. 525;
Woodlawn Farm Dairy Co. v. Erie R. R. Co., 282 Fed. 278;
Longsdorf Cyclopedia of Federal Procedure, Vol. 2, page 597.

We respectfully submit that under the facts as found by the Honorable Trial Court, which are not disputed, that the funds used by appellee Gruver in purchasing the drafts payable to the treasurer of the State of Washington and to the auditors of Clark and Skamania counties were Cowlitz county funds and therefore secured by the pledged school warrants and that the purchase of such drafts by the appellee Gruver constituted a deposit in appellant bank and that the sums paid therefor were secured by the pledged property.

Under the admitted facts in this case, we respectfully submit that in any event appellee Gruver would be entitled to plead and recover the amount paid for such drafts upon their being dishonored by way of set-off and counterclaim, and that the judgment of the Honorable Trial Court should in all things be affirmed.

Respectfully submitted,

G. W. HAMILTON,
Attorney General,

JOHN W. HANNA,
Assistant Attorney General,

CECIL C. HALLIN,
Prosecuting Attorney, Cowlitz County, Wash.

Attorneys for Appellee.

No. 7275

United States

Circuit Court of Appeals

For the Ninth Circuit.

POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a Corporation,

Appellant,

vs.

MOTORSHIP "HINDANGER" Her Tackle, Engines, Boilers, etc., and WESTFAL-LARSEN & CO., a Corporation,

Appellees,

and

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION, a Corporation,

Appellant,

vs.

MOTORSHIP "HINDANGER" Her Tackle, Engines, Boilers, etc., and WESTFAL-LARSEN & CO., a Corporation,

Appellees.

Apostles on Appeals

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

No. 7275

United States

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POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a Corporation,

Appellant,

vs.

MOTORSHIP "HINDANGER" Her Tackle, Engines, Boilers, etc., and WESTFAL-LARSEN & CO., a Corporation,

Appellees,

and

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION, a Corporation,

Appellant,

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MOTORSHIP "HINDANGER" Her Tackle, Engines, Boilers, etc., and WESTFAL-LARSEN & CO., a Corporation,

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Parker Printing Company, 545 Sansome Street, San Francisco.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Index Page

Index Page

In the Southern Division of the United States District Court, Northern District of California

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No. 20336-L

POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a corp.,

vs.

MOTORSHIP "HINDANGER", her engines, boilers, tackle, etc.,
WESTFAL-LARSEN & CO., a corp.,
GENERAL STEAMSHIP CORPORATION, a corp.,

and

No. 20337-L

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION, a corp.,

vs.

MOTORSHIP "HINDANGER", her engines, boilers, tackle, etc.,
WESTFAL-LARSEN & CO., a corp.,
GENERAL STEAMSHIP CORPORATION, a corp.

NAMES AND ADDRESSES OF ATTORNEYS

Proctors for Libellants and Appellants:

MILTON D. SAPIRO, Esq.,
CARL R. SCHULZ, Esq.,
1923 Russ Building, San Francisco, Calif.

Proctors for Libellees and Appellees:

MESSRS. LILLICK, OLSON & GRAHAM,
Balfour Bldg., San Francisco, Calif.

In the Southern Division of the United States District Court, for the Northern District of California.

First Division. In Admiralty.

No. 20336-L

POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a corporation,

Libelant,

vs.

MOTORSHIP HINDANGER, her engines, boilers, tackle, etc.,
WESTFAL-LARSEN & CO., a corporation,
GENERAL STEAMSHIP CORPORATION, a corporation,

Respondents.

LIBEL.

To the Honorable, the Judges of the United States District Court, for the Northern District of California.

The libel of Poultry Producers of Central California, a corporation, against the Motorship Hindanger, her engines, tackle, apparel and furniture, and against all persons lawfully intervening for their interest in said ship, her engines, tackle, apparel and furniture, and against WESTFAL-LARSEN & CO., and against GENERAL STEAMSHIP CORPORATION, in a cause of action civil and maritime, alleges as follows:

First. At all times hereinafter mentioned libelant was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with principal place of business at 700 Front Street, San Francisco, California, and is a cooperative organization engaged in the selling and distributing of eggs and other commodities.

Second. The Motorship Hindanger was and now is a general ship engaged in the transportation of merchandise for hire between the ports of Seattle, Washington, and San Francisco, California, and the port of Buenos Aires, Argentina, as well as other ports, and now is within the jurisdiction of the United States and of this Honorable Court. [1*]

Third. On information and belief respondent WESTFAL-LARSEN & Co. was and now is a corporation organized and existing under and by virtue

*Page numbering appearing at the foot of page of original certified Transcript of Record.

of the laws of Norway, with principal place of business at Bergen, Norway, and was and is a common carrier engaged in the carriage of merchandise for hire by water between the ports of Seattle, Washington, and San Francisco, California, and Buenos Aires, Argentina, and elsewhere. Respondent Westfal-Larsen & Co. at all times herein mentioned was, and still is, the owner of said Motorship Hindanger which vessel was at all said times a common carrier.

Fourth. On information and belief at all times herein mentioned respondent General Steamship Corporation was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with principal place of business at San Francisco, California, and held itself out to be and was and still is the agent of respondent Westfal-Larsen & Co. at San Francisco, California, for the purpose of entering into contracts of carriage for shipment on said Motorship Hindanger and for conducting negotiations to secure such contracts of carriage.

Fifth. Pacific Egg Producers Cooperative, Inc. at all times herein mentioned was and is the general selling agent of libelant and of Washington Cooperative Egg and Poultry Association and was authorized to book space, arrange shipment at Seattle, Washington, and San Francisco, California, and to attend to disposition of shipments at Buenos Aires, Argentina, among other duties.

Sixth. On or about the tenth day of March, 1930, Pacific Egg Producers Cooperative, Inc. as agent for libelant and for Washington Cooperative Egg

and Poultry Association, a corporation, entered into an oral contract of affreightment with respondent General Steamship Corporation as agent for respondent Westfal- [2] Larsen & Co. under the terms of which contract respondents agreed to transport and libelant agreed to furnish for transportation on said Motorship Hindanger at an agreed freight of seventy cents (70¢) per case not less than eleven thousand (11,000) nor more than fifteen thousand (15,000) cases of eggs to be carried in a refrigerator on said Motorship Hindanger from the ports of San Francisco, California, and/or Seattle, Washington, to the port of Buenos Aires, Argentina. Said oral contract further provided that said Motorship Hindanger was to sail from Seattle, Washington, on or about the 24th day of March, 1930, and from San Francisco, California, on or about the fourth day of April, 1930, and was to arrive at the port of Buenos Aires on or about the tenth day of May, 1930, it being understood and agreed that the time of arrival at the port of Buenos Aires was an important consideration inducing libelant to enter into said contract.

Seventh. Respondents represented to libelant prior to the entering into of said oral contract and for the purpose of inducing libelant to enter into said contract that the Motorship Hindanger would undertake a voyage which would permit of its arrival in Buenos Aires on or about May 10, 1930, and said representations did induce libelant to enter into said contract.

Eighth. Pacific Egg Producers Cooperative, Inc.

thereafter on or about the seventh day of April, 1930, in pursuance of said oral contract shipped and placed on board of said Motorship Hindanger at San Francisco, California, eleven thousand (11,000) cases of eggs for transportation to Buenos Aires, Argentina, and respondent Westfal-Larsen & Co. through General Steamship Corporation, its agent, issued and signed therefor a Bill of Lading calling for the transportation of said eleven thousand (11,000) cases of eggs to Buenos Aires which Bill of Lading was delivered by respondent General Steamship Corporation to Pacific Egg Producers Cooperative, Inc. Said eleven thousand (11,000) cases of eggs were [3] owned by libelant at the time of shipment and until disposed of by libelant in Buenos Aires after delivery by the Motorship Hindanger.

Ninth. Libelant performed all and singular of the terms of said oral contract and of said Bill of Lading.

Tenth. In violation of said oral contract and of said Bill of Lading and disregarding the aforesaid representations made to libelant by respondents, the Motorship Hindanger did not make the voyage as agreed, but respondents caused it to make another and different voyage with the result that said Motorship Hindanger arrived at Buenos Aires on or about the 29th day of May, 1930.

Eleventh. By reason of the premises and of the delay caused by such deviation from and breach of the contract of affreightment, libelant has sustained damages in the sum of Fifteen Thousand Dollars

($15,000.00) as nearly as same can now be estimated. The reason for said damages was a decline in the price of eggs in the market of Buenos Aires which decline occurred subsequently to the time at which said Motorship Hindanger would have arrived in Buenos Aires if the voyage contracted for had been made. No part of said sum of Fifteen Thousand Dollars ($15,000.00) has been paid although payment thereof has been duly demanded.

Twelfth. All and singular of the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays.

1. That process in due form of law according to the rules and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the Motorship Hindanger, her boilers, engines, etc., and against any and all persons having or claiming to have any interest therein, that they may be cited to appear and answer all and singular the matters aforesaid;

2. That citation in due form of law may issue against the respondents Westfal-Larsen & Co. and General Steamship Corporation [4] citing them to appear and answer all and singular the matters aforesaid, and that, if they cannot be found within this district, all their goods and chattels within this district may be attached by process of foreign attachment to the sum of Fifteen Thousand Dollars ($15,000.00) the sum sued for in this libel, with interest and costs;

3. That a decree may be entered here in favor of the libelant against the said respondents and against the said Motorship Hindanger, her engines, boilers, etc. for the amount of libelant's damages as set forth, together with interest thereon, and libelant's costs and disbursements;

4. That the said Motorship Hindanger, her engines, etc., may be condemned and sold to pay the same;

5. And that the court will grant to the libelant such other and further relief as may be just.

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for Libelant. [5]

United States of America,
Northern District of California.—ss.

R. H. McDrew, being duly sworn, deposes and says that he is an officer, to-wit, the Secretary of Poultry Producers of Central California, a corporation, the libelant in the above entitled cause, and makes this verification as such officer in behalf of said corporation; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true.

(signed) R. H. McDREW.

Subscribed and sworn to before me, this 14th day of August, 1930.

[Seal] (signed) KATHRYN E. STONE,
Notary Public in and for the City and County of San Francisco, State of California. [6]

INTERROGATORIES PROPOUNDED BY THE LIBELANT TO BE ANSWERED BY RESPONDENTS AND EACH OF THEM UNDER OATH

First Interrogatory: Does Westfal-Larsen & Co. now own the Motorship Hindanger?

Second Interrogatory: Has the respondent Westfal-Larsen & Co. been the owner of the Motorship Hindanger at any time since January 1, 1930, and, if so, for what period?

Third Interrogatory: (a) Was respondent General Steamship Corporation the agent of Westfal-Larsen & Co., at San Francisco, California, for any purposes?

(b) If so, for what purposes was respondent General Steamship Corporation the agent of Westfal-Larsen & Co.?

(c) Was General Steamship Corporation authorized to make representations as to the duration and nature of the voyage of the Motorship Hindanger from San Francisco, California, to Buenos Aires, Argentina, which commenced on or about April 10, 1930.

(d) If answer to (c) is Yes, what representations.

Fourth Interrogatory: State the ports of call at which the Motorship Hindanger called on said voyage from San Francisco, California, to Buenos Aires, Argentina, and the date of arrival and departure at each port.

Fifth Interrogatory: (a) State if respondent

Westfal-Larsen & Co. operates a regular service from San Francisco, California, to Buenos Aires, Argentina, of which the said voyage of the Motorship Hindanger constituted a regular sailing.

(b) How long has this service been maintained?

(c) State the dates of departure from San Francisco and arrival and departure at each port to and including Buenos Aires on each voyage in said service since April, 1928. [7]

Sixth Interrogatory: (a) What is the customary duration of the voyage from San Francisco, California, to Buenos Aires, in this service as customarily represented by respondents in sailing schedules?

(b) What is the customary duration of the voyage from San Francisco, California, to Buenos Aires, in this service as customarily represented by respondents in conversations with shippers when asked?

Seventh Interrogatory: (a) Was there any delay on the voyage of the Motorship Hindanger leaving San Francisco on or about April 10, 1930, in comparison with the customary voyage?

(b) If so, what were the causes of the delay in detail?

Eighth Interrogatory: (a) What is the customary period of time elapsing from arrival of vessels in this service at Montevideo to arrival at Buenos Aires?

(b) If there was any delay at Montevideo what caused it?

(c) What cargo did the Motorship Hindanger discharge at Montevideo?

(d) What is necessary to discharge any of this cargo in the stream?

(e) Did this cause delay?

Ninth Interrogatory: If the Motorship Hindanger called at Pernambuco on said trip how much delay was caused by said call as against the customary sailing schedule from the Canal to Rio de Janeiro?

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for libelant.

[Endorsed]: Filed Aug. 15, 1930. Walter B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk. [8]

In the Southern Division of the United States District Court, for the Northern District of California.

First Division. In Admiralty.

No. 20337-S

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION, a corporation,
Libelant,

vs.

MOTORSHIP HINDANGER, her engines, boilers, tackle, etc.,
WESTFAL-LARSEN & CO., a corporation,
GENERAL STEAMSHIP CORPORATION, a corporation,
Respondents.

LIBEL.

To the Honorable, the Judges of the United States District Court, for the Northern District of California.

The libel of Washington Cooperative Egg and Poultry Association, a corporation, against the Motorship Hindanger, her engines, tackle, apparel and furniture, and against all persons lawfully intervening for their interest in said ship, her engines, tackle, apparel and furniture, and against WESTFAL-LARSEN & CO., and against GENERAL

STEAMSHIP CORPORATION in a cause of action civil and maritime, alleges as follows:

First. At all times hereinafter mentioned libelant WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington with principal place of business at 201 Elliott Avenue West, Seattle, Washington, and is a cooperative organization engaged in the selling and distributing of eggs and other commodities.

Second. The Motorship Hindanger was and now is a general ship engaged in the transportation of merchandise for hire between the ports of Seattle, Washington, and San Francisco, California, and the port of Buenos Aires, Argentina, as well as other ports, and now is within the jurisdiction of the United States and of this Honorable Court. [9]

Third: On information and belief respondent Westfal-Larsen & Co. was and now is a corporation organized and existing under and by virtue of the laws of Norway, with principal place of business at Bergen, Norway, and was and is a common carrier engaged in the carriage of merchandise for hire by water between the ports of San Francisco, California, and Buenos Aires, Argentina, and elsewhere. Respondent Westfal-Larsen & Co. at all times herein mentioned was, and still is, the owner of said Motorship Hindanger which vessel was at all said times a common carrier.

Fourth. On information and belief at all times herein mentioned respondent General Steamship Corporation was and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with principal place of business at San Francisco, State of California, and held itself out to be and was and still is the agent for respondent Westfal-Larsen & Co. at San Francisco, California, for the purpose of entering into contracts of carriage for shipment on said Motorship Hindanger and for conducting negotiations to secure such contracts of carriage.

Fifth. Pacific Egg Producers Cooperative, Inc. at all times herein mentioned was and is the general selling agent of libellant and of Poultry Producers of Central California, a corporation, for the purpose of booking space, arranging shipments at Seattle, Washington, and San Francisco, California, and attending to disposition of shipments at Buenos Aires, among other duties.

Sixth. On or about the tenth day of March, 1930, Pacific Egg Producers Cooperative, Inc. as agent for libelant and Poultry Producers of Central California entered into an oral contract of affreightment with respondent General Steamship Corporation as agent for respondent Westfal-Larsen & Co. under the terms of which contract respondents agreed to transport and libelant agreed to furnish for transportation on said Motorship Hindanger at an agreed freight of [10] seventy cents (70¢) per case not less than eleven thousand (11,000) nor more than

fifteen thousand (15,000) cases of eggs to be carried in a refrigerator on said Motorship Hindanger from the ports of San Francisco, California, and/or Seattle, Washington, to the port of Buenos Aires, Argentina. Said oral contract further provided that said Motorship Hindanger was to sail from San Francisco on or about the fourth day of April, 1930, and was to arrive at the port of Buenos Aires on or about the tenth day of May, 1930, it being understood and agreed that the time of arrival at the port of Buenos Aires was an important consideration inducing libelant to enter into said contract.

Seventh. Respondents represented to libelant prior to the entering into of said oral contract and for the purpose of inducing libelant to enter into said contract that the Motorship Hindanger would undertake a voyage which would permit of its arrival in Buenos Aires on or about May 10, 1930, and said representations did induce libelant to enter into said contract.

Eighth. Libelant thereafter on or about the twenty-eighth day of March, 1930, in pursuance of said oral contract shipped and placed on board of said Motorship Hindanger at Seattle, Washington, four thousand (4,000) cases of eggs for transportation to Buenos Aires, Argentina, and respondent Westfal-Larsen & Co. through General Steamship Corporation its agent, issued and signed therefor a bill of lading calling for the transportation of said four thousand (4,000) cases of eggs to Buenos Aires which Bill of Lading was delivered by respondent

General Steamship Corporation to libelant's agent Pacific Egg Producers Cooperative, Inc. Said four thousand (4,000) cases of eggs were owned by libelant at the time of shipment and until disposed of by libelant in Buenos Aires after delivery by the Motorship Hindanger.

Ninth. Libelant performed all and singular of the terms of said oral contract and of said Bill of Lading. [11]

Tenth. In violation of said oral contract of said Bill of Lading and disregarding the aforesaid representations made to libelant by respondents, the Motorship Hindanger did not make the voyage as agreed, but respondents caused it to make another and different voyage with the result that said Motorship Hindanger arrived at Buenos Aires on or about the 29th day of May, 1930.

Eleventh. By reason of the premises and of the delay caused by such deviation from and breach of the contract of affreightment, libelant has sustained damages in the sum of Five Thousand Dollars ($5,000.00) as nearly as same can now be estimated. The cause of said damages was a decline in the price of eggs in the market of Buenos Aires which decline occurred subsequently to the time at which said Motorship Hindanger would have arrived in Buenos Aires if the voyage contracted for had been followed. No part of said sum of Five Thousand Dollars ($5,000.00) has been paid although payment thereof has been duly demanded.

Twelfth. All and singular of the premises are

true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays:

1. That process in due form of law according to the rules and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the Motorship Hindanger, her boilers, engines, etc., and against any and all persons having or claiming to have any interest therein, that they may be cited to appear and answer all and singular the matters aforesaid;

2. That citation in due form of law may issue against the respondents Westfal-Larsen & Co. and General Steamship Corporation citing them to appear and answer all and singular the [12] matters aforesaid, and that, if they cannot be found within this district, all their goods and chattels within this district may be attached by process of foreign attachment to the sum of Five Thousand Dollars ($5,000.00) the sum sued for in this libel, with interest and costs;

3. That a decree may be entered here in favor of the libelant against the said respondents and against the said Motorship Hindanger, her engines, boilers, etc. for the amount of libelant's damages as set forth, together with interest thereon, and libelant's costs and disbursements;

4. That the said Motorship Hindanger, her engines, etc., may be condemned and sold to pay the same;

5. And that the court will grant to the libelant such other and further relief as may be just.

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for libelant. [13]

State of California,
City and County of San Francisco—ss.:

Carl R. Schulz, being duly sworn, deposes and says: I am one of the proctors for the libelant herein; I have read the foregoing libel and know the contents thereof, and the same is true to the best of my knowledge, information and belief. The sources of my knowledge or information are communications received from the libelant and its agents and an examination of the papers relating to the matter in suit. The reasons why this verification is not made by the libelant is that said libelant is a foreign corporation, none of whose officers are within this District or within the City and County of San Francisco.

(Signed) CARL R. SCHULZ

Sworn to before me this 14th day of August, 1930
[Seal] (Signed) KATHRYN E. STONE
Notary Public, in and for the City and County of San Francisco, State of California. [14]

INTERROGATORIES PROPOUNDED BY THE LIBELANT TO BE ANSWERED BY RESPONDENTS AND EACH OF THEM UNDER OATH:

First Interrogatory: Does Westfal-Larsen & Co. now own the Motorship Hindanger?

Second Interrogatory: Has the respondent Westfal-Larsen & Co. been the owner of the Motorship Hindanger at any time since January 1, 1930, and, if so, for what period?

Third Interrogatory: (a) Was respondent General Steamship Corporation the agent of Westfal-Larsen & Co., at San Francisco, California, for any purposes?

(b) If so, for what purposes was respondent General Steamship Corporation the agent of Westfal-Larsen & Co.?

(c) Was General Steamship Corporation authorized to make representations as to the duration and nature of the voyage of the Motorship Hindanger from San Francisco, California, to Buenos Aires, Argentina, which commenced on or about April 10, 1930.

(d) If answer to (c) is Yes, what representations.

Fourth Interrogatory: State the ports of call at which the Motorship Hindanger called on said voyage from San Francisco, California, to Buenos Aires, Argentina, and the date of arrival and departure at each port.

Fifth Interrogatory: (a) State if respondent Westfal-Larsen & Co. operates a regular service from San Francisco, California, to Buenos Aires, Argentina, of which the said voyage of the Motorship Hindanger constituted a regular sailing.

(b) How long has this service been maintained?

(c) State the dates of departure from San Francisco and arrival and departure at each port to and

including Buenos Aires on each voyage in said service since April, 1928. [15]

Sixth Interrogatory: (a) What is the customary duration of the voyage from San Francisco, California, to Buenos Aires, in this service as customarily represented by respondents in sailing schedules?

(b) What is the customary duration of the voyage from San Francisco, California, to Buenos Aires, in this service as customarily represented by respondents in conversations with shippers when asked?

Seventh Interrogatory: (a) Was there any delay on the voyage of the Motorship Hindanger leaving San Francisco on or about April 10, 1930, in comparison with the customary voyage?

(b) If so, what were the causes of the delay in detail?

Eighth Interrogatory: (a) What is the customary period of time elapsing from arrival of vessels in this service at Montevideo to arrival at Buenos Aires?

(b) If there was any delay at Montevideo what caused it?

(c) What cargo did the Motorship Hindanger discharge at Montevideo?

(d) Was it necessary to discharge any of this cargo in the stream?

(e) Did this cause delay?

Ninth Interrogatory: If the Motorship Hindanger called at Pernambuco on said trip how much delay was caused by said call as against the cus-

tomary sailing schedule from the Canal to Rio de Janeiro?

MILTON D. SAPIRO
CARL R. SCHULZ
Proctors for libelant.

[Endorsed]: Filed Aug 15 1930 Walter B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk. [16]

[Title of Court and Cause No. 20336-L]

ANSWER TO LIBEL AND TO INTERROGATORIES ATTACHED THERETO.

To the Honorable, the Judges of the above entitled Court:

The answer of respondents herein to the libel of the above named libelant admits, denies and alleges as follows:

I.

Respondents allege that they have no information or belief sufficient to enable them to answer the allegations of Article First of the libel herein, and therefore call for strict proof thereof, if relevant.

II.

Admit the allegations of Article Second of the said libel.

III.

Admit the allegations of Article Third of the said libel. [17]

IV.

Admit the allegations of Article Fourth of the said libel.

V.

Allege that they have no information or belief sufficient to enable them to answer the allegations of Article Fifth of the said libel, and therefore call for strict proof thereof, if relevant.

VI.

Answering unto the allegations of Article Sixth of the said libel deny that on or about the 10th day of March, 1930, Pacific Egg Producers Co-operative, Inc. either as agent for libelant or anyone or otherwise, or for Washington Cooperative Egg & Poultry Association, a corporation, or anyone or otherwise, entered into an oral or other contract of affreightment, or any contract with respondent General Steamship Corporation, Ltd. either as agent for respondent Westfal-Larsen & Co., A/S., or any one, under the terms of which, or any contract, respondents agreed to transport, or libelant agreed to furnish for transportation on said motorship "HINDANGER," or any other vessel, at an agreed or other freight of Seventy Cents (70¢), or any other amount, per case or other quantity, not less than 11,000 nor more than 15,000 cases of eggs, or any other number of cases of eggs, to be carried in a refrigerator, or otherwise, on said motorship "HINDANGER," or any other vessel, from the ports of San Francisco, California and/or Seattle, Washington, and/or any other port or ports, to the port of Buenos Aires, Ar-

gentina, or any other port. Respondents deny that any oral contract was ever entered into between libelant and respondents, or any of them, either further or otherwise providing that said motorship "HINDANGER," or any [18] other vessel, was to sail from Seattle, Washington, or any other port, on or about the 24th day of March, 1930, or any other date, or from San Francisco, California, or any other port, on or about the 4th day of April, 1930, or any other date; or was to arrive at the port of Buenos Aires, or any other port, on or about the 10th day of May, 1930, or at any other time, or at all; or that it was understood or agreed, and respondents deny that it was understood or agreed, that the time of arrival at the port of Buenos Aires was an important or other consideration inducing libelant to enter into any such contract, and deny that any contract was ever entered into between said libelant and said respondents, other than that evidenced by a certain bill of lading, a copy of which is hereto attached, marked "Exhibit A" and hereby specifically referred to and made a part hereof.

VII.

Deny each and all of the allegations contained in Article Seventh of the said libel.

VIII.

Admit that Pacific Egg Producers Co-Operative, Inc. on or about the 7th day of April, 1930, shipped and placed on board of said motorship "HINDANGER" at San Francisco, California, 11,000 cases

of eggs for transportation to Buenos Aires, Argentina, and respondent Westfal-Larsen & Co., A/S., through General Steamship Corporation, Ltd., its agent, issued and signed therefor a bill of lading calling for the transportation of said 11,000 cases of eggs to Buenos Aires, which bill of lading was delivered by respondent General Steamship Corporation, Ltd. to Pacific Egg Producers Co-Operative, Inc.; but deny that the issuance, execution or delivery of said bill of lading was in pursuance of the alleged, or any, oral contract referred to in the libel herein, or in [19] pursuance of any contract, oral or otherwise, other than the contract evidenced by the terms of said bill of lading, a copy of which is attached hereto, marked "Exhibit A" and hereby made a part hereof.

As to the allegation in said article of said libel that said 11,000 cases of eggs were owned by libelant at the time of shipment and until disposed of by libelant in Buenos Aires after delivery by the Motorship "HINDANGER," respondents have no information or belief sufficient to enable them to answer the said allegation and therefore call for strict proof thereof, if relevant.

IX.

Respondents admit that libelant has paid the freight specified in said bill of lading, and allege that the eggs therein referred to have been delivered in accordance with the terms of said bill of lading; but deny that any oral contract was entered into

between libelant and respondents, either as alleged in said libel, or otherwise, or at all.

X.

Answering Article Tenth of said libel, and repeating respondents' denials and allegations hereinbefore recited with reference to said alleged oral contract, the entry into which, or any contract by respondents with libelant other than that recited in the bill of lading, respondents deny, and the said respondents and each of them deny that the terms of the said bill of lading, or any of said terms, were violated by them, or any of them, and deny that any of the terms of any contract entered into between libelant and said respondents have been violated by any of said respondents; and respondents further deny the making of any representations to libelant which were not true; and further deny disregarding any representation made to libelant and allege that [20] the motorship "HINDANGER" did make the voyage agreed to be made under the terms of the bill of lading issued to libelant, and respondents deny that the said motorship made any other or different voyage than that specified in the said bill of lading, but admit that the said motorship "HINDANGER" did arrive at Buenos Aires on or about the 29th day of May, 1930.

Further answering said Article Tenth of said libel, respondents deny each and all of the allegations therein contained, except that they admit that the motorship "HINDANGER" arrived at Buenos Aires on or about the 29th day of May, 1930, and

allege that the said voyage consisted of a voyage by the said vessel from the West coast of North America to the East coast of South America over the customary route traveled by the vessels operated by the Westfal-Larsen Line in said trade, and that said vessel completed said voyage in all respects in conformity with the provisions of the bill of lading under which the eggs referred to in said libel were shipped.

XI.

Answering the allegations of Paragraph Eleventh of said libel, respondents deny the premises therein referred to, except as hereinbefore specifically admitted, and deny that there was any delay in the arrival of said motorship at Buenos Aires other than that which was customary in view of the cargo carried by her, and the weather conditions met on said voyage, and deny that there was any deviation on the part of said vessel in making said voyage; and further deny any breach of any of the conditions of the agreement under which said eggs were carried; and further deny that there was any contract of affreightment other than that which is evidenced by the bill of lading under which the said eggs were shipped, a copy of which is hereto attached, marked "Exhibit [21] A," and allege that they have no information or belief sufficient to enable them to answer the remaining allegations of Article Eleventh of the said libel, and, therefore, call for strict proof thereof, save and except that respondents admit that libelant has demanded pay-

ment of the sum of $15,000. from the said respondents, and admit that respondents have paid no part thereof to the libelant.

XII.

Deny that all and singular, or all or singular, the premises are true (except as hereinbefore specifically admitted), but admit that if true, they are within the admiralty and maritime jurisdiction of this Honorable Court.

FURTHER AND SEPARATE DEFENSES.

I.

Further answering the said libel, and as a further and separate defense thereto, respondents allege that by the terms and conditions of the bill of lading and/or contract of carriage hereinbefore referred to, it is provided, in part, as follows:

> "2. The vessel to have liberty, either before or after proceeding towards the port of discharge; to proceed to the said port via any port or ports in any order or rotation outward or forward, whether in or out of, or in a contrary direction to, or beyond the customary or advertised route; to pass the said port for which the cargo is destined and to return thereto; without same being deemed a deviation, whatever may be the reason for calling at or entering said port or ports, for making such voyage or voyages, whether for the purpose of this, a prior, or subsequent voyage; to altogether de-

part from the customary route; to make in substance another and different voyage; to change or completely abandon the original voyage; to transship or land and reship the goods at ports of shipment and transshipment, or at any other ports, or into any other steamer or steamers or sailing vessel for any purpose, [22] and to forward to destination by another vessel; * * *.

"3. The Carrier shall not be responsible to any extent for any loss, damage or delay arising from or consequent upon the acts of God * * * restraints of princes, governments and rulers of people, * * * lighterage, * * * perils or accidents of the seas, rivers, lakes, and navigation * * *.

"6. Carrier is not and shall not be required to deliver said packages at port of delivery at any particular time or to meet any particular market or in time for any particular use; * * *.

"7. Also, in case the shipment hereunder is made from any port on the Pacific Ocean to any port on the Atlantic Ocean, the Carrier shall have the right to carry the same via Panama Canal or Straits of Magellan or Cape Horn, or, as heretofore set forth, to transship. * * *

"12. Goods in Refrigerator. Steamer shall not be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation or other appliances, nor for detention, * * *.

"15. * * * The Carrier shall not be liable for any claim whatsoever unless written notice thereof shall be given to the Carrier upon removal of the goods from the wharf. No suit to recover for loss or damage shall in any event be maintainable against the carrier unless instituted within three months after giving written notice, as above provided. The Carrier shall not be liable for claims for damage or detention to goods, whether under through-bills of lading or otherwise, where the damage is done, or detention occurs, whilst the goods are not in the possession of the Carrier; and all claims for loss of or damage or injury to any goods or property, for which the Carriers are liable under the terms hereof, shall be adjusted upon the basis of the invoice value of the said goods or property, or of the market value of goods or property of the same nature and quality at the place and time of original shipment, unless the invoice or declared value of the said goods or property, or the sound market value of said goods or property at the time and place of delivery shall be less than such invoice or market value, in which case such invoice or declared value, or such sound market value, at the time and place of [23] delivery (whichever shall be the less) shall be the maximum liability.

"And finally in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agrees to

be bound by all its stipulations, exceptions and conditions, whether written, printed or stamped as fully as if they were all signed by such shipper, owner or consignee."

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

II.

That by the terms and conditions of the said bill of lading it is specifically provided that the vessel shall have liberty, after proceeding towards the port of discharge, to proceed to the said port via any port or ports in any order or rotation, outwards or forward, whether in or out of, or in a contrary direction to, or beyond the customary or advertised route, without the same being deemed a deviation, whatever may be the reason for calling at, or entering said port or ports; and respondents allege that in proceeding towards the port of discharge, namely, Buenos Aires, the said motorship commenced the voyage without needless delay, and prosecuted it without unnecessary delay or deviation, and in making the ports in geographical order on her way to Buenos Aires, the said motorship, in strict compliance with the provisions of said bill of lading, delivered certain consignments of her cargo at said ports, calling thereat in the customary route and order, and if any delay (which respondents deny) occurred in the transportation of said eggs, such delay was caused by the said vessel stopping at said ports, by perils of the seas, and port regulations at the

various ports at which said motorship "HINDANGER" stopped in making the said voyage.

Respondents therefore claim the benefit of the said [24] provisions of the said bill of lading.

III.

That by the terms and conditions of the said bill of lading it is specifically provided that the carrier should not be required to deliver the cargo carried by it at the port of delivery at any particular time or to meet any particular market or in time for any particular use.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

IV.

That by the terms and conditions of the said bill of lading it is specifically provided that as to goods in refrigerators the vessel shall not be accountable for any loss or damage to goods arising from detention.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

V.

That by the terms and conditions of the said bill of lading it is specifically provided that the carrier shall not be responsible for loss or damage of any kind which may result directly or indirectly from restrictions of quarantine, sanitary, customs, or other regulations.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

VI.

That by the terms and conditions of the said bill of lading it is specifically provided that the carrier shall not be liable for any claim whatsoever unless written notice thereof shall be given to the carrier upon removal of the goods from the wharf, and that no suit to recover for loss or damage shall in any event be [25] maintainable against the carrier unless instituted within three (3) months after giving written notice as provided in said bill of lading.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

VII.

That by the terms and conditions of the said bill of lading it is specifically provided that as to all claims for loss or damage for which the carrier is liable under the terms of the bill of lading, that it shall be adjusted upon the invoice value of the said goods, or the market value of the said goods of the same nature and quality at the place and time of original shipment unless the invoice or declared value of the said goods, or the sound market value of said goods at the time and place of delivery shall be less than such invoice or market value, in which case such invoice or declared value, or such sound market value at the time and place of delivery (whichever shall be the less) shall be the maximum liability.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

VIII.

Respondents allege that in making the said voyage upon which said eggs were shipped, that the said respondents exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, and that said vessel was in all respects seaworthy and properly manned, equipped and supplied at the beginning of the said voyage, and that at all times herein mentioned, due and proper care was exercised by the respondents herein and by the officers, employees and agents of the said respondents in the conduct of the affairs of the said vessel as [26] that the said vessel, as promptly as the conditions of the trade permitted, and in the usual and customary manner operating the said vessel as a general cargo-carrier, took on from various ports of shipment upon the West coast of North America certain commodities for delivery at various ports upon the East coast of South America. That these various ports on the East coast of South America were touched and stayed at only the necessary periods within which to promptly discharge the cargo consigned for said ports, and that said respondents, in fact, so handled the affairs of the said vessel by working overtime, and otherwise, as to make the said voyage in a shorter period of time than under the circumstances it would have been necessary for them to conclude it, and that every effort was made by said respondents to diligently transport the goods carried by the said vessel on the voyage in question to their destinations: allege, upon information and belief, that if any loss

was sustained by the owner of the said eggs, such damage was not caused or contributed to by any fault or neglect on the part of the respondents and the officers, employees or agents of respondents, but was the result of a falling market price in eggs at the port of destination and the result of a cause or causes excepted in the bill of lading hereinbefore referred to, for which said respondents are not, and none of them is, liable to libelant herein.

Respondents therefore claim the benefit of the said provisions of the said bill of lading and/or contract of carriage.

WHEREFORE, respondents pray that the libel herein be dismissed, and for their costs of suit herein incurred.

LILLICK, OLSON AND GRAHAM,
Proctors for Respondents. [27]

ANSWERS TO INTERROGATORIES PROPOUNDED BY THE LIBELANT, TO BE ANSWERED BY RESPONDENTS, AND EACH OF THEM, UNDER OATH.

Answering the said interrogatories in the order in which they appear:

To the First Interrogatory: Yes.

To the Second Interrogatory: The respondent, Westfal-Larsen & Co., A/S, has been the owner of the motorship "HINDANGER" ever since the first day of January, 1930.

To the Third Interrogatory: (a) Yes, as agents for Westfal-Larsen & Co. Line, operating between

the Pacific Coast of North America, Brazil, Uruguay, and the Argentine.

(b) Answered under "(a)" above.

(c) Yes, as to the nature of the voyage and the probable duration thereof, but with no authority to make any representation that the motorship "HINDANGER" would arrive at Buenos Aires, Argentina, at any particular time.

(d) Representations as to the time customarily occupied by the vessels of the Line on their voyages in that particular trade, stopping on their way down the coast at their usual ports of call, namely: Pernambuco, Montevideo, Buenos Aires, Rosario, Trinidad, Santa Fe and other way ports as inducements offered.

To the Fourth Interrogatory: See "Exhibit B," a part hereof.

To the Fifth Interrogatory: (a) Yes.

(b) Through the Panama Canal since October, 1929; prior to that time through the Straits [28] of Magellan.

(c) See "Exhibit B," a part hereof.

To the Sixth Interrogatory: (a) Approximately from 36 to 40 days, although as given in the answer under subdivision (c) to the Fifth Interrogatory, the "HINDANGER" on Voyage No. 2 made the voyage to Buenos Aires in 50 days; the "BRIMANGER" on Voyage No. 6 made the voyage in 47 days; and the "VILLANGER" on Voyage No. 7 made the trip in 45 days.

(b) Approximately from 35 to 40 days.

To the Seventh Interrogatory: (a) Yes.

(b) Heavy weather, head seas and heavy current between the Panama Canal and Pernambuco; at Pernambuco the "HINDANGER" had to await her turn at berth on account of the unusually crowded conditions at the port and bad weather at Bahia, preventing the "HINDANGER" from discharging upon her arrival, as part of the discharge had to be made according to the customs and regulations of the port in lighters, and even though the vessel worked overtime and Sunday, she was delayed in her voyage. In Montevideo a consignment of gasoline and kerosene, under the regulations of the port, were discharged into lighters, and this also delayed the "HINDANGER" to some extent.

To the Eighth Interrogatory: (a) Only eight voyages have been made and on these eight voyages one vessel made no stop at Montevideo. On the others, 3 days; 4 days; 7 days; 7 days; 7 days; ("HINDANGER" voyage in question) 8 days; 13 days.

(b) Discharge of cargo. [29]

(c) Kerosene, gasoline, lumber and general cargo.

(d) Yes, because kerosene and gasoline under regulations of the port have to be discharged in the stream.

(e) Only such customary delay as any general cargo ship contemplates when she carries gasoline and similar cargo.

To the Ninth Interrogatory: If by the customary sailing schedule from the Canal to Rio de Janeiro no stop was contemplated at Pernambuco, the "HIND-

ANGER" took 2 days in waiting for a berth and discharging cargo at Pernambuco, but, as hereinbefore recited, the "HINDANGER" was making a customary voyage from the West coast of North America to the East coast of South America on a well-defined and customary route with general cargo, and she and the other motorships of the Line held themselves out as general cargo carriers to accept and deliver cargo at the various ports of call on the East coast of South America, and in making such a stop at Pernambuco no delay, other than that which necessarily would be incurred in making such a stop, resulted.

LILLICK, OLSON AND GRAHAM
Proctors for Respondents. [30]

	Sailed San Francisco	Arrived Los Angeles	Sailed Los Angeles	Arrived Bahia Blanca	Sailed Bahia Blanca	Arrived Montevideo	Arrived Buenos Aires
SS HARDANGER	Apl 30 1928	May 2 1928	May 2 1928	May 31 1928	June 9 1928		June 17 1928
MS HOYANGER	Jun 19 1928			Jly 20 1928			Aug 5 1928
SS EVANGER	Jly 26 1928	Jly 28 1928	Jly 28 1928			Aug 30 1928	Sep 11 1928
MS BRANDANGER	Aug 25 1928			Sep 25 1928		Oct 6 1928	Oct 16 1928
SS HARDANGER	Sep 26 1928	Sep 28 1928	Sep 28 1928			Oct 29 1928	Nov 2 1928
SS LEIKANGER	Oct 27 1928	Oct 29 1928	Nov 11 1928*	Dec 11 1928		Dec 18 1928	Dec 23 1928
SS EVANGER	Dec 22 1928	Dec 24 1928	Dec 24 1928			Jan 25 1929	Jan 29 1929
MS BRANDANGER	Jan 24 1929	Jan 26 1929	Jan 26 1929			Feb 27 1929	Mch 6 1929
SS HARDANGER	Feb 25 1929	Feb 27 1929	Feb 27 1929			Mch 30 1929	Apl 11 1929
SS LEIKANGER	Mch 26 1929	Mch 28 1929	Mch 28 1929			Apl 29 1929	May 5 1929
MS HOYANGER	Apl 22 1929	Apl 24 1929	Apl 24 1929			May 24 1929	Jun 6 1929
SS EVANGER		Jun 16 1929	Jun 16 1929				Jly 21 1929
MS BRANDANGER	Jun 25 1929						Jly 30 1929
SS HARDANGER	Jly 23 1929	Jly 25 1929	Jly 25 1929	Aug 25 1929		Sep 1 1929	Sep 6 1929
SS LEIKANGER	Aug 21 1929	Aug 23 1929	Aug 23 1929	Arr: Puerto Chicama Sep 6 1929	Sld Puerto Chicama Sep 11 1929	Oct 3 1929	Oct 15 1929

	Arr: Rio de Janeiro	Sld: Rio de Janeiro	Arr: Santos	Sld: Santos	Arr: Monte video	Arr: Buenos Aires
MS VILLANGER	Oct 17 1929	Oct 18 1929	Oct 18 1929	Nov 14 1929	Nov 16 1929	Nov 17 '29	Nov 18 '29		(1929
MS HINDANGER	Nov 23 1929	Nov 25 1929	Nov 25 1929	Dec 24 1929	Dec 25 1929	Dec 26 '29	Dec 26 '29	Dec 30 '29	(Nov 22 1930) Jan 12)

	Sld SF	Arr LA	Sld LA	Arr: Pernambuco	Sld. Pernambuco	Sld. Bahia					
	1930	1930	1930	1930	1930	1930					1930
MS BRIMANGER	Jan 13	Jan 15	Jan 15	Feb 8	Feb 10		Feb 14 1930	Feb 14 1930	Feb 15 '30	Feb 15 '30	Feb 19 '30	Feb 22
MS VILLANGER	Mch 5	Mch 7	Mch 8	Apl 1	Apl 1		Apl 5 1930	Apl 6 1930	Apl 7 '30	Apl 7 '30	Apl 10 '30	Apl 14
MS HINDANGER	Apl 10	Apl 12	Apl 13	May 7	May 8	May 12	May 15 1930	May 16 1930	May 17 '30	May 17 '30	May 21 '30	May 29
MS BRIMANGER	May 21	May 23	May 24	Jun 18	June 18		Jun 22 1930	Jun 25 1930	Jun 26 '30	Jun 26 '30	Jun 30 '30	Jly 7
MS VILLANGER	Jly 1	Jly 3	Jly 3				Aug 2 1930	Aug 3 1930	Aug 4 '30	Aug 4 '30	Aug 8 '30	Aug 15
MS TARANGER	Aug 7	Aug 8	Aug 8				Sep 4 1930	Sep 4 1930	Sep 5 '30	Sep 6 '30	Sep 9 '30	Sep 14

San Francisco, Sep 18th 1930

*Returned to Los Angeles for repairs.

State of California,
City and County of San Francisco.—ss.

E. Petersen, being first duly sworn, deposes and says: That he is an officer, to-wit; the Resident Agent, of WESTFAL-LARSEN & CO., A/S, a corporation, one of the respondents herein, and as such officer he is authorized to make this verification in its behalf; that he has read the foregoing Answer to Libel and Answers to Interrogatories, and knows the contents thereof, and that they are true except as to such matters as are alleged to be on information or belief, and that, as to such matters, he believes them to be true.

(sgd) E. PETERSEN.

Subscribed and sworn to before me this 23rd day of September, 1930.

[Seal] M. V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California. [32]

WESTFAL-LARSEN COMPANY LINE

GENERAL STEAMSHIP CORPORATION

AGENTS

EAST COAST SOUTH AMERICA SERVICE

1101 Fourth Avenue
Seattle
60-62 Broadway
Portland
Empire Shipping Co.
Vancouver, B. C.

Rio de Janeiro, Brazil
Santos, Brazil

Buenos Aires, Argentina
Montevideo, Uruguay

240 Battery Street
San Francisco
Spring Arcade Building
Los Angeles

☞ SHIPPERS SHOULD CAREFULLY READ THIS BILL OF LADING AS IT CONSTITUTES THE CONTRACT BETWEEN THEM AS OWNERS, OR AGENTS OF THE OWNERS OF THE GOODS) AND THE CARRIERS

BILL OF LADING

RECEIVED in apparent good order and condition, except as noted, from PACIFIC EGG PRODUCERS COOPERATIVE Inc.

the undermentioned packages, for shipment from the Port of San Francisco, California

Motorsh[ip] in the Steamship "HINDANGER" or other vessel weights, contents, and condition of contents of packages unknown) to be carried upon said vessel with liberty to transship to any other vessels whatsoever, subject to the conditions on the face and back hereof unto the port of

BUENOS AIRES,

or so near thereunto as she can safely get and stay always safely afloat at all states of Tide, and there [illegible] agreement [illegible] and [illegible] to be delivered at vessel's tackles unto ORDER OF PACIFIC EGG PRODUCERS CO-OPERATIVE INC., NOTIFY: L. VAN BOKELEN Inc., Buenos Aires, Argentina.

or his or their assigns, he or they paying freight for the said goods as per charter-party, with primage and average accustomed. And [illegible] is agreed that no carrier, [illegible] beyond said port of discharge or delivery unto consignees mentioned above. Subject to like exceptions, conditions and [illegible] as expressed in said connecting carrier

MARKS AND NUMBERS	NO. OF PACKAGES	DESCRIPTION OF PACKAGES	WEIGHT	MEASR.
VANBO Buenos Aires Gross 26.30 kilos net 20.41 kilos. .066 Cubic Meters Produce of U.S.A.	11,000	Cases. Eggs in shells. -----Eleven thousand cases in all----- FREIGHT PREPAID UNDER REFRIGERATION	289,300 kilos.	25667 cu.ft.

RATES, WEIGHT AND OR MEASUREMENT SUBJECT TO CORRECTION

1. The Carriers (which expression wherever used herein includes the Owners, Charterers, Agents and/or Managers of the vessel) have liberty to transship at any port or ports. The Carriers have the option of [illegible] proceeding to any port or place other than the port or place of discharge, and stowing on shore or ashore at [illegible] receiving the goods by other vessel or craft or rail or other means, and may deliver the cargo at such port of destination and return same thereto by any other route at their own expense and [illegible] risk.

2. The vessel to have liberty, either before or after proceeding towards the port of discharge; to proceed to the said port via any port or ports in any order or route outwards or forward, whether in or out of [illegible] order of advertised [illegible] to pass the said port without calling [illegible] without same being deemed a deviation, whatever may be the [illegible] and port or ports of [illegible]

for making such voyage or voyages, whether for the purpose of this, a prior, or subsequent voyage, to altogether depart from the customary route, to make in substance another and different voyage, to change or completely abandon the original voyage, to transship or land and reship the goods at ports of shipment and transhipment, or at any other ports, or into any other steamer or steamers or sailing vessel for any purpose, and to forward to destination by another vessel, also to tow and assist vessels in all situations and to sail with or without pilots; all the said liberties, exceptions and conditions shall apply, although the vessel may be deviating from the voyage, and although such deviation may amount to a change or abandonment of the voyage; the voyage, and although such deviation may amount to a change or abandonment of the voyage; all [illegible] services rendered within the contract voyage and notwithstanding unseaworthiness or unfitness on the part of the vessel at the commencement or during any period of the voyage.

3. The Carrier shall not be responsible to any extent for any loss, damage or delay arising from or consequent upon the acts of God, enemies, privateers, pirates, robbers, thieves of whatever kind, whether in the service of the Carriers or not, pilferage, rising of passengers, barratry of masters and mariners, restraints of princes, governments and rulers of people, strikes, lockouts, labor disputes, riots, lighterage, transhipment, jettison, explosion, heat, vermin, rain, fire at sea or upon an wharf, in warehouse, on lighter or elsewhere at any time, perils or accidents of the seas, rivers, lakes, and navigation, or to or arising from boilers, steam, machinery, pumps, tanks, or pipes of any kind (including consequences of defect therein or damage thereto), collision, whether with vessels of the same ownership or otherwise, stranding or stranding, reefing over, upsetting, submerging or sinking of ship, in harbor, river or at sea, or the entry or admission of water or oil into the vessel by any cause or for any purpose, or the leaking or emission of water or oil from any tank or other receptacle in or upon the vessel, or any act or omission, negligence, default, or error in judgment of the Carriers, pilot, master, officers, mariners, engineers, crew, stevedores, lightermen, warehousemen, agents or other persons whomsoever in the service of the Carriers or their agents or for whom the Carriers would otherwise have been responsible, whether on board the said ship or any other ship belonging to or chartered by them or on shore or from unseaworthiness before or after the commencement of the voyage, arose or developed during the voyage provided all means have been taken to make the vessel seaworthy. The shipowner's responsibility shall commence and cease at ship's tackles.

IN WITNESS WHEREOF, the Agent of said vessel hath signed three BILLS OF LADING, one of which being accomplished the others to stand void.

Dated at San Francisco, Cal. 7th day of April 1930

WESTFAL-LARSEN & CO. A/S.
By GENERAL STEAMSHIP CORPORATION, Agents
By C. A. REALI

COPY NON-NEGOTIABLE

All of the provisions above and on the reverse side of this Bill of Lading are hereby agreed to

PACIFIC EGG PRODUCERS COOPERATIVE Inc.
Shipper
By M. C. OHARA

B L No. 35

33

FREIGHT				
cases		case		
11000	AT .70	PER TON	7700.00	
CU FT	AT	PER TON		
LBS.	AT	PER 2000		
LBS.	AT	PER 2000		
LBS.	AT	PER 2240		
BD FT	AT	PER 1000		
BD. FT.	AT	PER 1000		
			7700.00	
Toll M 24080 M Ft			90.30	
Offshore 1587 M Ft				
Total			7790.30	

FREIGHT PREPAID
IN SAN FRANCISCO

Feb 17 Exhibit

Stipulations and Conditions Referred to on Face Hereof and all of which are Agreed to by Shipper

4. The Carriers shall not be responsible to any extent for any loss, damage or delay arising from or consequent upon sweating, insufficiency or insecurity of package, in size, strength, or otherwise, leakage, breakage, bending, chafage, wastage, spray, rust, frost, thaw, decay, hook marks or injury from hooks or ship's tackle, stowage, or contact with, or smell, evaporation, or other damage from any other goods, inaccuracies in, obliteration, insufficiency or absence of marks, numbers, or addresses, or description of goods shipped, injury to or soiling of wrappers or packages, however caused.

5. The Carriers shall not be accountable or liable to any extent, for any loss of, injury or damage to bullion, specie, precious metals, manufactured or unmanufactured plated articles, jewelry, articles used for jewelry, precious stones, trinkets, watches, clocks, timepieces, mosaics, bills, bank notes of any country, orders, notes or securities for payment of money, stamps, maps, letters, writings, title deeds, paintings, engravings, pictures, statuary, silks, furs, lace or cashmere manufactured or unmanufactured, made up into clothes or otherwise contained in any package or parcel, whatever may be the value of such articles, unless bills of lading in which value and contents are stated are signed therefore and ad valorem freight paid thereon. Specie will not be landed by the ship. It can only be delivered on presentation of Bills of Lading on board, and will be carried on at Consignee's risk if delivery is not taken during the steamer's stay in port.

6. Carrier is not and shall not be required to deliver said packages at port of delivery at any particular time or to meet any particular market or in time for any particular use, and shipper shall notify consignee or other person or forwarder or carrier at place of delivery to there receive packages as discharged at ship's tackles, and packages may be discharged immediately on arrival of vessel at port or anchorage or wharf or landing.

7. Also, in case the shipment hereunder is made from any port on the Pacific Ocean to any port on the Atlantic Ocean, the carrier shall have the right to carry the same via Panama Canal or Straits of Magellan or Cape Horn, or as heretofore set forth to tranship.

8. Also, that the master of the vessel has the right of hiring lighters at the port of destination for the landing of the within goods at the expense and risk of owners of said goods; and if this in his judgment is inexpedient the goods to be taken from the ship's tackles where the ship's responsibility shall cease, and to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master at the expense of the consignee, and at his risk of fire, loss or injury, as the authorities of the Port of Discharge shall direct. If by reason of the want or impossibility of obtaining lighters, in Master's opinion, the vessel is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods he is at liberty to proceed on his voyage with the whole or any portion of the within goods remaining on board and to forward them to destination from the first convenient port he may subsequently call at, at the risk and expense of the consignee, and the carrier shall not be responsible for damage or loss as the consequence thereof.

9. Fish, fruit, vegetables and other perishable goods, earthenware, china, glass, crockery, or articles contained in glass or crockery, or castings, or any articles of a fragile nature are carried only at the risk of the shipper, owner or consignee absolutely.

10. Any goods or merchandise taken on deck shall be at the risk of the shipper, owner or consignee absolutely, and all goods may be carried in shelter deck, poop, bridge space, deck house, peaks or other space whatsoever.

11. Goods of an inflammable or explosive or corrosive or otherwise dangerous or injurious nature shall be distinctly so marked as to indicate their character before shipment, and be transported, if the carriers choose, on deck or elsewhere, and they shall in all cases be at the shipper's or owner's risk. If any such articles shall be delivered to the carriers without stating the character thereof and having the same distinctly and legibly marked upon the package or case containing the same, the shippers shall be responsible for any damage to other cargo and to the ship caused by such goods and such articles may be seized and confiscated or destroyed by the carriers, if deemed necessary, without incurring any liability therefor. All fines, expenses, losses or damage which the carriers or their agents or servants, or the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the packages, or description of their contents, or other failure to comply with customs regulations or by reason of the inflammable, explosive, corrosive or otherwise dangerous or injurious nature of such contents, shall be borne by and be recoverable from the owner, shipper or consignee, whether such owner, shipper or consignee shall be aware thereof or not.

12. Goods in refrigerator. Steamer shall not be accountable for the condition of goods shipped under this Bill of Lading nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation or other appliances nor for detention nor for the consequences of any act, neglect, default or error of judgment of the Master, Officers, Engineers, Crew or other persons in the service of the Owners, nor for any other cause whatsoever and steamer shall be at liberty to jettison the whole or any part thereof if considered necessary on account of decomposition.

13. If the Carriers shall have exercised due diligence to provide a ship in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in the case of danger, damage or disaster, resulting from faults or errors in navigation or in the management of the ship, or from any defect in the ship, her machinery or appurtenances, or from unseaworthiness whether existing at the time of shipment or beginning or during the course of the voyage, that the Carrier shall not be liable and that the consignees or owners of the cargo shall nevertheless pay salvage and any special charge incurred in respect of the cargo, and shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses, of a general average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect and to the same extent as if such danger, damage, or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any defect or unseaworthiness. In case of salvage services rendered to aforesaid goods or property during this voyage, by a vessel or vessels of the Carriers, such salvage services shall be paid for as fully as if such salving vessel belonged to a third party. All claims of the nature of general average shall be adjusted and settled in conformity with York-Antwerp Rules, 1924, the ship reserving the right of lien on cargo for contribution, and adjustment shall be made in the United States of America unless the Carrier shall otherwise decide.

14. If by reason of blockade or interdict of the port of destination, war, disturbances, restrictions of quarantine, sanitary, customs, labor or other regulations, lock-outs, strikes, trade disputes or labor disturbances, or any other reasonable cause, the entering of or discharging in the port of destination is in the opinion of the Master, likely to be prevented or delayed, or the commencement, continuance or completion of the voyage is prevented or is considered by the Master in his absolute discretion unsafe and inadvisable the goods or any portion thereof may, at the option of the Master and at the entire expense and risk of the owners of the goods, either be discharged into quarantine depot, hulk or other vessel required for the ship's dispatch, or transhipped to another vessel to be forwarded to destination, or landed or warehoused or otherwise disposed of as circumstances may admit, with power in the case of perishable goods to sell same by auction without reserve at the owner's risk, each or any of which things may be done at such port or place (including the port of shipment) as the Master may in his absolute discretion consider safe, suitable or convenient, or the Master may, notwithstanding the ship's arrival at port of destination, or the commencement of the discharge of the goods, proceed on his voyage and land the goods at any other port which he may consider safe, or may retain the goods on board until the ship's return, all at the expense and risk of the owners of the goods, and the ship's responsibility shall cease when the goods are discharged into the hands of the port authorities, or into other proper or safe keeping, or according to the custom of the port, or where perishable goods are sold as aforesaid the Master gives notice as soon as practicable to the Consignees or shippers of the goods so far as they can be ascertained. The Company shall not be responsible for loss or damage of any kind which may result directly or indirectly from any of the above clauses. Freight when payable by shippers is to be considered as earned notwithstanding the non-completion of the voyage under any of the above circumstances. When the freight is payable by the Consignee and the goods are discharged other than at the port of destination under the provisions of this clause, the consignee or the shipper at the option of the Company shall be liable for freight at the ordinary rate charged by the Company for carriage of similar goods from port of shipment to the actual port of discharge, or if there be no such ordinary rate, or if the goods be returned to the port of shipment, then such consignee or shipper shall be liable for freight at a rate which bears the same proportion to the freight which would have been payable if the voyage had been completed which the mileage actually traversed bears to the mileage which would in such case have been traversed. The Company shall have lien on the goods for all freight charges and expenses payable by the consignee or shipper thereof under the provisions of this clause.

15. In case of any loss or damage for which the Company or connecting carrier may be liable, it shall receive the benefit of any insurance upon such goods in favor of the shipper, owner or consignee, and to any payments made by or on behalf of the insurers thereof whether under the guise of advances, loans, or otherwise, even though the said loss or damage occurs while the said vessel is deviating from the voyage. The Carrier shall not be liable for any claim whatsoever unless written notice thereof shall be given to the Carrier upon removal of the goods from the wharf. No suit to recover for loss or damage shall in any event be maintainable against the Carrier unless instituted within three months after giving written notice as above provided. The Carrier shall not be liable for claims for damage or detention to goods, whether under through bills of lading or otherwise where the damage is done or detention occurs whilst the goods are not in the possession of the Carrier; and all claims for loss of or damage or injury to any goods or property, for which the Carriers are liable under the terms hereof, shall be adjusted upon the basis of the invoice value of the said goods or property or of the market value of goods or property of the same nature and quality at the place and time of original shipment, unless the invoice or declared value of the said goods or property or the sound market value of said goods or property at the time and place of delivery shall be less than such invoice or market value, in which case such invoice or declared value or such sound market value, at time and place of delivery (whichever shall be the less) shall be the maximum liability. It is mutually agreed that the value of each package shipped hereunder does not exceed the sum of one hundred dollars ($100), on which basis the freight is adjusted and the carrier's liability shall in no respect, exceed that sum unless a value in excess thereof be declared and stated herein and extra freight, as may be agreed upon, paid. And in the event of partial loss and/or damage for which the carrier may be responsible, the liability to be prorated to the sum payable in excess of the total amount of loss or damage calculated in accordance with the above conditions. Any claim and/or legal proceedings of whatsoever nature for loss or damage howsoever arising out of this bill of lading shall, in the option of the Company, be dealt with in San Francisco, California, according to the laws of the United States of America, to the exclusion of proceedings in any court or courts in any other country or countries.

16. Full freight is payable on damaged or unsound goods; freight if payable at any other place than at destination to be paid, ship or goods lost or not lost, and whether the voyage be complete or not and to be due in full exchange for Bill of Lading, or if payable by consignee on arrival of goods at place of destination in exchange for delivery order; settlement in either case to be made without discount or abatement, freight and disbursements payable by consignees in United States Gold Coin or its equivalent in local currency, at the banks demand rate of exchange on New York on date of steamer's arrival at port of discharge of said goods; freight on goods to order, liquids and brittle or perishable goods to be paid by shippers if required; this Bill of Lading duly endorsed to be given up in exchange for delivery order if required; the carriers shall have a lien on the goods or property not only for all freight and other charges to be paid under the provisions hereof and for all payments made and liabilities incurred in respect of any fines, damages, or other charges of whatsoever nature which under the provisions hereof are to be borne by the owner, shipper or consignee of the goods or property but for all previously unsatisfied freight charges, fines, damages and other charges of whatsoever nature due to him or them by the said owner, shipper or consignee and whether payable in advance or not.

17. The shippers and buyers of the goods are liable jointly and severally for all freight and charges payable under the terms hereof, and for all other expenses incurred in the event of goods or property being sold to enforce the aforesaid lien or by reason of being unclaimed or refused by consignees and not realizing sufficient to pay such freight and charges in full; freight at the rate herein stated and all other charges accruing on said goods must be paid before delivery and according to weights or measurements as ascertained by any carrier hereunder, and if upon inspection, it is ascertained that the articles shipped are not those described in this Bill of Lading, double freight charges must be paid upon the articles actually shipped, and at the rates properly applicable. The goods are to be discharged from this ship as soon as she is ready to unload, and if the consignee is not ready to receive, they may be discharged by the master on to the wharf, or into hulk, lazaretto, or hired lighters, if necessary, at the expense and risk of the owners of the goods. The ship may, irrespective of weather, discharge continuously, Sundays and holidays included, and should the master or agents require discharge to be made beyond the usual custom hours, consignees shall be bound, if so required, to immediately sign an application for this purpose. The porterage of the delivery of the cargo whether by day or night, including the cubage of all goods carried by measurement and weighing of all goods carried by weight, shall, at the option of the ship, be done by the consignees of the ship at their tariff rates, at the expense and risk of the owners of the goods.

18. The goods or property during lighterage from vessel to vessel or between the vessel and shore and whilst on any wharf, hulk or raft, or in any warehouse awaiting shipment, reshipment or transshipment, shall be at the risk of the owner, shipper or consignee absolutely.

19. With respect to livestock, the ship shall provide only water and stalls or other necessary pens or enclosures. Shipper shall provide necessary feed and attendance for such livestock from the time taken on board ship until landed at destination. Feed for livestock shall be carried on board ship freight free, except that any surplus feed landed at destination shall pay freight at current rates. Freight charges on livestock must in all cases, unless otherwise specially arranged, be paid in advance on each and every head of livestock taken on ship, and freight so paid cannot be returned, shipped or livestock lost or not lost. The Carriers shall not be held liable for injury to or loss of livestock however caused, the same being carried at the shipper's risk absolutely, even in case of neglect of Carrier's servants or of unseaworthiness or unfitness. Freight is payable on number shipped.

20. Freight prepaid or payable in advance to be considered as earned, steamer or goods lost, or not lost.

21. Unless shipper, owner or consignee makes Customs Import Entry at ports of call, the carriers may make such entry and add cost of making such entry to the charges shown on this Bill of Lading.

22. NOTIFICATION CLAUSE _ No claim shall under any circumstances whatever attach to the ship or its owners or agents for failure to notify consignees of arrival of goods.

23. Nothing herein contained shall prevent the shipowners from claiming the benefits of the United States Revised Statutes, Sections 4281 to 4287, and the rules from time to time made thereunder and of the provisions of the Act of Congress of the United States approved on the 13th day of February, 1893, entitled "An act relating to Navigation of Vessels, &c." Provided that in all cases where merchandise or property is transported under this contract from or between parts of the United States and foreign ports within the meaning of the said Act of Congress of 1893, and proceedings are taken against the company or vessel carrying the goods, then the provisions of the said Act of Congress and Revised Statutes shall be held to apply to this contract, and the shipments shall be subject to all the terms and provisions of and all exemptions from liability contained in the said Act of Congress and Revised Statutes; and any provisions of this Bill of Lading inconsistent with the said Act of Congress and Revised Statutes shall be treated as stricken out and expunged.

24. This Bill of Lading when issued covering traffic from a Canadian port, is subject to all the terms and provisions of and all the exemptions from liability contained in the Water Carriage of Goods Act, 1920.

25. In case of delivery to a connecting Carrier or Carriers, liability shall be several, and shall end at ship's slings upon delivery to connecting Carrier, which delivery shall be considered a good and sufficient delivery under this Bill of Lading. If freight be prepaid to Carrier beyond said first mentioned place of delivery, Carrier shall be Shipper's Agent for payment to other Carrier of such freight as may be so paid for other Carrier's use, and freight of every Carrier of said merchandise by water shall be deemed earned when such packages shall be laden on board of other Carrier's vessel, and shall be payable by Shipper, whether such other Carrier's vessel or said packages be thereafter lost or not lost at any stage of the entire transit. Goods are subject to delay at port of transhipment and any additional charges incurred for storage, cartage, or other expenses, to be borne by consignees or owners of the goods.

26. Should any existing or future order or regulation of any government authorities prevent the above goods being conveyed in any particular ship or class of ships, the carriers are to be free from any liability for non-fulfillment of their contract.

27. Any alteration, addition or erasure in this Bill of Lading shall be signed or initialed in the margin by an Agent of the Carrier issuing the same and if not so signed or initialed shall be deemed without effect, and this Bill of Lading shall be enforceable according to its original tenor.

AND FINALLY in accepting this Bill of Lading, the Shipper, Owner and Consignee of the goods, and the holder of the Bill of Lading agrees to be bound by all its stipulations, exceptions and conditions whether written, printed or stamped, as fully as if they were all signed by such Shipper, Owner, Consignee or Holder.

PACIFIC MANIFOLDING BOOK CO. LOS ANGELES EMERYVILLE CALIF. SEATTLE 22 301

[Endorsed]: Receipt of a copy of the within answer is hereby admitted this 23rd day of September, 1930.

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for Libelant.

Filed Sep. 23, 1930. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [35]

[Title of Court and Cause No. 20337-L.]

ANSWER TO LIBEL AND TO INTERROGATORIES ATTACHED THERETO.

To the Honorable, the Judges of the above entitled Court:

The answer of respondents herein to the libel of the above named libelant admits, denies and alleges as follows:

I.

Respondents allege that they have no information or belief sufficient to enable them to answer the allegations of Article First of the libel herein, and therefore call for strict proof thereof, if relevant.

II.

Admit the allegations of Article Second of the said libel.

III.

Admit the allegations of Article Third of the said libel. [36]

IV.

Admit the allegations of Article Fourth of the said libel.

V.

Allege that they have no information or belief sufficient to enable them to answer the allegations of Article Fifth of the said libel, and therefore call for strict proof thereof, if relevant.

VI.

Answering unto the allegations of Article Sixth of the said libel deny that on or about the 10th day of March, 1930, Pacific Egg Producers Co-operative, Inc. either as agent for libelant or anyone or otherwise, or for Poultry Producers of Central California, a corporation, or anyone or otherwise, entered into an oral or other contract of affreightment, or any contract with respondent General Steamship Corporation, Ltd., or with anyone either as agent for respondent Westfal-Larsen & Co., A/S., or any one, under the terms of which, or any contract, respondents agreed to transport, or libelant agreed to furnish for transportation on said motorship "HINDANGER," or any other vessel, at an agreed or other freight of Seventy Cents (70¢), or any other amount, per case or other quantity, not less than 11,000 nor more than 15,000 cases of eggs, or any other number of cases, to be carried in a refrigerator, or otherwise, on said motorship "HINDANGER," or any other vessel, from the ports of San Francisco, California and/or Seattle, Washington, and/or any other port or ports, to the port of Buenos Aires, Ar-

gentina, or any other port. Respondents deny that any oral contract was ever entered into between libelant and respondents, or any of them, either further or otherwise providing that said motorship "HINDANGER," or any other vessel, was to sail from Seattle, Washington, or any other [37] port, on or about the 24th day of March, 1930, or any other date, or from San Francisco, California, or any other port, on or about the 4th day of April, 1930, or any other date; or was to arrive at the port of Buenos Aires, or any other port, on or about the 10th day of May, 1930, or at any other time, or at all; or that it was understood or agreed, and respondents deny that it was understood or agreed, that the time of arrival at the port of Buenos Aires was an important or other consideration inducing libelant to enter into any such contract, and deny that any contract was ever entered into between said libelant and said respondents, other than that evidenced by a certain bill of lading, a copy of which is hereto attached, marked "Exhibit A" and hereby specifically referred to and made a part hereof.

VII.

Deny each and all of the allegations contained in Article Seventh of the said libel.

VIII.

Admit that Washington Cooperative Egg and Poultry Association on or about the 24th day of March, 1930, shipped and placed on board of said motorship "HINDANGER" at Seattle, Washing-

ton, 4,000 cases of eggs for transportation to Buenos Aires, Argentina, and respondent Westfal-Larsen & Co., A/S., through General Steamship Corporation, Ltd., its agent, issued and signed therefor a bill of lading calling for the transportation of said 4,000 cases of eggs to Buenos Aires, which bill of lading was delivered by respondent General Steamship Corporation, Ltd. to Pacific Egg Producers Co-Operative, Inc.; but deny that the issuance, execution or delivery of said bill of lading was in pursuance of the alleged, or any, oral contract referred to in the libel herein, or in pursuance of any contract, oral or otherwise, other than the contract [38] evidenced by the terms of said bill of lading, a copy of which is attached hereto, marked "Exhibit A" and hereby made a part hereof.

As to the allegation in said article of said libel that said 4,000 cases of eggs were owned by libelant at the time of shipment and until disposed of by libelant in Buenos Aires after delivery by the Motorship "HINDANGER," respondents have no information or belief sufficient to enable them to answer the said allegation and therefore call for strict proof thereof, if relevant.

IX.

Respondents admit that libelant has paid the freight specified in said bill of lading, and allege that the eggs therein referred to have been delivered in accordance with the terms of said bill of lading; but deny that any oral contract was entered into

between libelant and respondents, either as alleged in said libel, or otherwise, or at all.

X.

Answering Article Tenth of said libel, and repeating respondents' denials and allegations hereinbefore recited with reference to said alleged oral contract, the entry into which, or any contract by respondents with libelant other than that recited in the bill of lading, respondents deny, and the said respondents and each of them deny that the terms of the said bill of lading, or any of said terms, were violated by them, or any of them, and deny that any of the terms of any contract entered into between libelant and said respondents have been violated by any of said respondents; and respondents further deny the making of any representations to libelant which were not true; and further deny disregarding any representation made to libelant and allege that the motorship "HINDANGER" did make the voyage agreed to be made [39] under the terms of the bill of lading issued to libelant, and respondents deny that the said motorship made any other or different voyage than that specified in the said bill of lading, but admit that the said motorship "HINDANGER" did arrive at Buenos Aires on or about the 29th day of May, 1930.

Further answering said Article Tenth of said libel, respondents deny each and all of the allegations therein contained, except that they admit that the motorship "HINDANGER" arrived at Buenos Aires on or about the 29th day of May, 1930, and

allege that the said voyage consisted of a voyage by the said vessel from the West coast of North America to the East coast of South America over the customary route traveled by the vessels operated by the Westfal-Larsen Line in said trade, and that said vessel completed said voyage in all respects in conformity with the provisions of the bill of lading under which the eggs referred to in said libel were shipped.

XI.

Answering the allegations of Paragraph Eleventh of said libel, respondents deny the premises therein referred to, except as hereinbefore specifically admitted, and deny that there was any delay in the arrival of said motorship at Buenos Aires other than that which was customary in view of the cargo carried by her, and the weather conditions met on said voyage, and deny that there was any deviation on the part of said vessel in making said voyage; and further deny any breach of any of the conditions of the agreement under which said eggs were carried; and further deny that there was any contract of affreightment other than that which is evidenced by the bill of lading under which the said eggs were shipped, a copy of which is hereby attached, marked "Exhibit [40] A," and allege that they have no information or belief sufficient to enable them to answer the remaining allegations of Article Eleventh of the said libel, and, therefore, call for strict proof thereof, save and except that respondents admit that libelant has demanded pay-

ment of the sum of $5000.00 from the said respondents, and admit that respondents have paid no part thereof to the libelant.

XII.

Deny that all and singular, or all or singular, the premises are true (except as hereinbefore specifically admitted), but admit that if true, they are within the admiralty and maritime jurisdiction of this Honorable Court.

FURTHER AND SEPARATE DEFENSES.

I.

Further answering the said libel, and as a further and separate defense thereto, respondents allege that by the terms and conditions of the bill of lading and/or contract of carriage hereinbefore referred to, it is provided, in part, as follows:

> "2. The vessel to have liberty, either before or after proceeding towards the port of discharge; to proceed to the said port via any port or ports in any order or rotation outwards or forward, whether in or out of, or in a contrary direction to, or beyond the customary or advertised route; to pass the said port for which the cargo is destined and to return thereto; without same being deemed a deviation, whatever may be the reason for calling at or entering said port or ports, for making such voyage or voyages, whether for the purpose of this, a prior, or subsequent voyage; to altogether de-

part from the customary route; to make in substance another and different voyage; to change or completely abandon the original voyage; to transship or land and reship the goods at ports of shipment and transshipment, or at any other ports, or into any other steamer or steamers or sailing vessel for any purpose, [41] and to forward to destination by another vessel; * * *.

"3. The Carrier shall not be responsible to any extent for any loss, damage or delay arising from or consequent upon the acts of God * * * restraints of princes, governments and rulers of people, * * * lighterage, * * * perils or accidents of the seas, rivers, lakes, and navigation * * *.

"6. Carrier is not and shall not be required to deliver said packages at port of delivery at any particular time or to meet any particular market or in time for any particular use; * * *.

"7. Also, in case the shipment hereunder is made from any port on the Pacific Ocean to any port on the Atlantic Ocean, the Carrier shall have the right to carry the same via Panama Canal or Straits of Magellan or Cape Horn, or, as heretofore set forth, to transship. * * *

"12. Goods in Refrigerator. Steamer shall not be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation or other appliances, nor for detention, * * *.

"15. * * * The Carrier shall not be liable for any claim whatsoever unless written notice thereof shall be given to the Carrier upon removal of the goods from the wharf. No suit to recover for loss or damage shall in any event be maintainable against the carrier unless instituted within three months after giving written notice, as above provided. The Carrier shall not be liable for claims for damage or detention to goods, whether under through-bills of lading or otherwise, where the damage is done, or detention occurs, whilst the goods are not in the possession of the Carrier; and all claims for loss of or damage or injury to any goods or property, for which the Carriers are liable under the terms hereof, shall be adjusted upon the basis of the invoice value of the said goods or property, or of the market value of goods or property of the same nature and quality at the place and time of original shipment, unless the invoice or declared value of the said goods or property, or the sound market value of said goods or property at the time and place of delivery shall be less than such invoice or market value, in which case such invoice or declared value, or such sound market value, at the time and place of [42] delivery (whichever shall be the less) shall be the maximum liability.

"And finally in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agrees to

be bound by all its stipulations, exceptions and conditions, whether written, printed or stamped as fully as if they were all signed by such shipper, owner or consignee."

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

II.

That by the terms and conditions of the said bill of lading it is specifically provided that the vessel shall have liberty, after proceeding towards the port of discharge, to proceed to the said port via any port or ports in any order or rotation, outwards or forward, whether in or out of, or in a contrary direction to, or beyond the customary or advertised route, without the same being deemed a deviation, whatever may be the reason for calling at, or entering said port or ports; and respondents allege that in proceeding towards the port of discharge, namely, Buenos Aires, the said motorship commenced the voyage without needless delay, and prosecuted it without unnecessary delay or deviation, and in making the ports in geographical order on her way to Buenos Aires, the said motorship, in strict compliance with the provisions of said bill of lading, delivered certain consignments of her cargo at said ports, calling thereat in the customary route and order, and if any delay (which respondents deny) occurred in the transportation of said eggs, such delay was caused by the said vessel stopping at said ports, by perils of the seas, and port regulations at the

various ports at which said motorship "HINDANGER" stopped in making the said voyage.

Respondents therefore claim the benefit of the said [43] provisions of the said bill of lading.

III.

That by the terms and conditions of the said bill of lading it is specifically provided that the carrier should not be required to deliver the cargo carried by it at the port of delivery at any particular time or to meet any particular market or in time for any particular use.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

IV.

That by the terms and conditions of the said bill of lading it is specifically provided that as to goods in refrigerators the vessel shall not be accountable for any loss or damage to goods arising from detention.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

V.

That by the terms and conditions of the said bill of lading it is specifically provided that the carrier shall not be responsible for loss or damage of any kind which may result directly or indirectly from restrictions of quarantine, sanitary, customs, or other regulations.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

VI.

That by the terms and conditions of the said bill of lading it is specifically provided that the carrier shall not be liable for any claim whatsoever unless written notice thereof shall be given to the carrier upon removal of the goods from the wharf, and that no suit to recover for loss or damage shall in any event be [44] maintainable against the carrier unless instituted within three (3) months after giving written notice as provided in said bill of lading.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

VII.

That by the terms and conditions of the said bill of lading it is specifically provided that as to all claims for loss or damage for which the carrier is liable under the terms of the bill of lading, that it shall be adjusted upon the invoice value of the said goods, or the market value of the said goods of the same nature and quality at the place and time of original shipment unless the invoice or declared value of the said goods, or the sound market value of said goods at the time and place of delivery shall be less than such invoice or market value, in which case such invoice or declared value, or such sound market value at the time and place of delivery (whichever shall be the less) shall be the maximum liability.

Respondents therefore claim the benefit of the said provisions of the said bill of lading.

VIII.

Respondents allege that in making the said voyage upon which said eggs were shipped, that the said respondents exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, and that said vessel was in all respects seaworthy and properly manned, equipped and supplied at the beginning of the said voyage, and that at all times herein mentioned, due and proper care was exercised by the respondents herein and by the officers, employees and agents of the said respondents in the conduct of the affairs of the said vessel as [45] that the said vessel, as promptly as the conditions of the trade permitted, and in the usual and customary manner operating the said vessel as a general cargo-carrier, took on from various ports of shipment upon the West coast of North America certain commodities for delivery at various ports upon the East coast of South America. That these various ports on the East coast of South America were touched and stayed at only the necessary periods within which to promptly discharge the cargo consigned for said ports, and that said respondents, in fact, so handled the affairs of the said vessel by working overtime, and otherwise, as to make the said voyage in a shorter period of time than under the circumstances it would have been necessary for them to conclude it, and that every effort was made by said respondents to diligently transport the goods carried by the said vessel on the voyage in question to their destination; allege, upon information and belief, that if any loss

was sustained by the owner of the said eggs, such damage was not caused or contributed to by any fault or neglect on the part of the respondents and the officers, employees or agents of respondents, but was the result of a falling market price in eggs at the port of destination and the result of a cause or causes excepted in the bill of lading hereinbefore referred to, for which said respondents are not, and none of them is, liable to libelant herein.

Respondents therefore claim the benefit of the said provisions of the said bill of lading and/or contract of carriage.

WHEREFORE, respondents pray that the libel herein be dismissed, and for their costs of suit herein incurred.

LILLICK, OLSON AND GRAHAM,
Proctors for Respondents. [46]

ANSWERS TO INTERROGATORIES PROPOUNDED BY THE LIBELANT, TO BE ANSWERED BY RESPONDENTS, AND EACH OF THEM, UNDER OATH.

Answering the said interrogatories in the order in which they appear:

To the First Interrogatory: Yes.

To the Second Interrogatory: The respondent, Westfal-Larsen & Co., A/S, has been the owner of the motorship "HINDANGER" ever since the first day of January, 1930.

To the Third Interrogatory: (a) Yes, as agents for Westfal-Larsen & Co. Line, operating between

the Pacific Coast of North America, Brazil, Uruguay, and the Argentine.

(b) Answered under "(a)" above.

(c) Yes, as to the nature of the voyage and the probable duration thereof, but with no authority to make any representation that the motorship "HINDANGER" would arrive at Buenos Aires, Argentina, at any particular time.

(d) Representations as to the time customarily occupied by the vessels of the Line on their voyages in that particular trade, stopping on their way down the coast at their usual ports of call, namely: Pernambuco, Montevideo, Buenos Aires, Rosario, Trinidad, Santa Fe and other way ports as inducements offered.

To the Fourth Interrogatory: See "Exhibit B," a part hereof.

To the Fifth Interrogatory: (a) Yes.

(b) Through the Panama Canal since October, 1929; prior to that time through the Straits [47] of Magellan.

(c) See "Exhibit B," a part hereof.

To the Sixth Interrogatory: (a) Approximately from 36 to 40 days, although as given in the answer under subdivision (c) to the Fifth Interrogatory, the "HINDANGER" on Voyage No. 2 made the voyage to Buenos Aires in 50 days; the "BRIMANGER" on Voyage No. 6 made the voyage in 47 days; and the "VILLANGER" on Voyage No. 7 made the trip in 45 days.

(b) Approximately from 35 to 40 days.

To the Seventh Interrogatory: (a) Yes.

(b) Heavy weather, head seas and heavy current between the Panama Canal and Pernambuco; at Pernambuco the "HINDANGER" had to await her turn at berth on account of the unusually crowded conditions at the port and bad weather at Bahia, preventing the "HINDANGER" from discharging upon her arrival, as part of the discharge had to be made according to the customs and regulations of the port in lighters, and even though the vessel worked overtime and Sunday, she was delayed in her voyage. In Montevideo a consignment of gasoline and kerosene, under the regulations of the port, were discharged into lighters, and this also delayed the "HINDANGER" to some extent.

To the Eighth Interrogatory: (a) Only eight voyages have been made and on these eight voyages one vessel made no stop at Montevideo. On the others, 3 days; 4 days; 7 days; 7 days; 7 days; ("HINDANGER" voyage in question) 8 days; 13 days.

(b) Discharge of cargo. [48]

(c) Kerosene, gasoline, lumber and general cargo.

(d) Yes, because kerosene and gasoline under regulations of the port have to be discharged in the stream.

(e) Only such customary delay as any general cargo ship contemplates when she carried gasoline and similar cargo.

To the Ninth Interrogatory: If by the customary sailing schedule from the Canal to Rio de Janeiro no stop was contemplated at Pernambuco, the "HIND-

ANGER" took 2 days in waiting for a berth and discharging cargo at Pernambuco, but, as hereinbefore recited, the "HINDANGER" was making a customary voyage from the West coast of North America to the East coast of South America on a well-defined and customary route with general cargo, and she and the other motorships of the Line held themselves out as general cargo carriers to accept and deliver cargo at the various ports of call on the East coast of South America, and in making such a stop at Pernambuco no delay, other than that which necessarily would be incurred in making such a stop, resulted.

LILLICK, OLSON AND GRAHAM
Proctors for Respondents. [49]

"EXHIBIT B"

(Exhibit B is identical with Exhibit B attached to the original answer in case No. 20336; a copy of which is embodied in these apostles elsewhere.) [50]

State of California,
City and County of San Francisco.—ss.

E. Petersen, being first duly sworn, deposes and says: That he is an officer, to-wit; the Resident Agent, of WESTFAL-LARSEN & CO., A/S, a corporation, one of the respondents herein, and as such officer he is authorized to make this verification in its behalf; that he has read the foregoing Answer to Libel and Answers to Interrogatories, and knows the contents thereof, and that they are true except as to such matters as are alleged to be on information or belief, and that, as to such matters, he believes them to be true.

(sgd) E. PETERSEN.

Subscribed and sworn to before me this 23rd day of September, 1930.

[Seal] M. V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California. [51]

Printed in U. S. A.

WESTFAL-LARSEN COMPANY LINE

GENERAL STEAMSHIP CORPORATION

AGENTS

EAST COAST SOUTH AMERICA SERVICE

1101 Fourth Avenue
Seattle
60-62 Broadway
Portland
Empire Shipping Co.
Vancouver, B. C.

Rio de Janeiro, Brazil
Santos, Brazil

Buenos Aires, Argentina
Montevideo, Uruguay

240 Battery Street
San Francisco
Spring Arcade Building
Los Angeles

☛ SHIPPERS SHOULD CAREFULLY READ THIS BILL OF LADING AS IT CONSTITUTES THE CONTRACT BETWEEN THEM AS OWNERS, OR AGENTS OF THE OWNERS OF THE GOODS) AND THE CARRIERS

BILL OF LADING

RECEIVED in apparent good order and condition, except as noted, from WASHINGTON CO-OPERATIVE EGG & POULTRY ASS'N the undermentioned packages, for shipment from the Port of SEATTLE, WASHINGTON in the Steamship M/S "MINDANAOAN" Motorship or other vessel weights, contents, and condition of contents of packages unknown) to be carried upon said vessel with liberty to tranship to any other vessels whatsoever, subject to the conditions on the face and back hereof unto the port of BUENOS AIRES or so near thereunto as she can safely get and stay always safely afloat at all states of Tide, and there in like apparent good order and condition, to be delivered at vessel's tackles unto ORDER/VICTOR L. VAN BOKKELEN, INC., BUENOS AIRES or his or their assigns, or at vessel's tackles to a connecting carrier if consigned beyond said port of discharge for delivery unto consignee mentioned above Subject to his exceptions and exemptions all weights and all numbers stated by said connecting carrier

MARKS AND NUMBERS	NO. OF PACKAGES	DESCRIPTION OF PACKAGES	WEIGHT	MEASR.
VAN B. BUENOS AIRES	4000	CASES SAID TO CONTAIN FRES EGGS (3763 CASES SAID TO CONTAIN FRESH EGGS "PLAIN"	(100,228 KGS)	

(SHIPPER'S COUNT, SAID TO CONTAIN FRESH EGGS, PROCESSED)

Received for shipment in apparent good order and condition and subject to refriger ator clauses on back of this bill of lading.

The owners undertake that before loading refrigerated produce in an insulated space or spaces they will obtain the certificate of a competent surveyor that such insulated space or spaces and the refrigerating machinery have been surveyed by him and found in good condition and suitable for the conveyance of refrigerated cargoes. It is hereby agreed that the certificates or reports of such certificates shall be obtained by the charterers, shippers and consignees or indorsees of this bill of lading as conclusive evidence that the owner of the vessel has exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied. The ship owners are not to be responsible for damage or loss resulting from faults or error in navigation or in the management of the vessel. The above terms and conditions are to be read as absolutely unqualified by any other words, whether written or printed, appearing in this contract or ship's receipt herein, and full and complete effect shall be given to them, anything appearing to the contrary herein notwithstanding.

1. The Carriers (which expression wherever used herein includes the Owners, Charterers, Agents and/or Master of and carrying vessel) have the liberty to tranship at any port or ports. The Carriers have the option of landing the cargo on any port or place other than the port or place of discharge, and storing on shore or afloat, and of forwarding the same by other vessel or craft or rail or other means, and may over-carry the same over the port of destination and return same thereto by any other means at the shipper's expense and owner's risk.

2. The vessel to have liberty, either before or after proceeding to or to the port of discharge, to proceed to the said port via any port or ports in any order or rotation outwards or forward, whether in or out of, or in a contrary direction to or beyond the customary or advertised route; to pass the said port for coal, bunkering or repairs or for any other purpose without same being deemed a deviation whatever or for the purpose of loading or discharging cargo or passengers or for making such voyage or voyages, whether for the purpose of this, a prior, or subsequent voyage, to altogether depart from the customary route, to make in substance another and different voyage, to change or completely abandon the original voyage, to tranship or land and reship the goods at ports of shipment and transhipment, or at any other ports, or into any other steamer or steamers or to lay vessel for any purpose, and to forward to destination by another vessel also to tow and assist vessels in all situations and to sail with or without pilots; all the said liberties, exceptions and conditions shall apply, although the vessel may be deviating from the voyage, and although such deviation may amount to a change or abandonment of the voyage. All such deviations are to be deemed within the contract voyage and notwithstanding unseaworthiness or unfitness of the ship at the commencement or during any part of the voyage.

3. The Carrier shall not be responsible to any extent for any loss, damage or delay arising from or consequent upon the acts of God, enemies, privateers, pirates, robbers, thieves of whatever kind, whether in the service of the Carriers or not, pilferage, rising of passengers, barratry of masters and mariners, restraints of princes, governments and rulers of people, strikes, lockouts, labor disputes, riots, hijacking, transhipment, jettison, explosion, heat, vermin, rain, fire at sea, in port on wharf, in warehouse, on lighter or elsewhere at any time, perils or accidents of the seas, rivers, lakes, and navigation, or to or arising from boilers, steam, machinery, dumps, tanks, or pipes of any kind including consequences of defect therein or damage thereto), collision, whether with vessels of the same ownership or otherwise, stranding or stranding, keeling over, upsetting, submerging or sinking of ship, in harbor, river or at sea, or the entry or admission of water or oil into the vessel by any cause or for any purpose, or the loosing or emission of water or oil from any tank or other receptacle in or upon the vessel, or any act or omission, negligence, default, or error in judgment of the Carriers, pilot, master, officers, mariners, engineers, crew, stevedores, lightermen, warehousemen, agents or other persons whomsoever in the service of the Carriers or their agents or for whom the Carriers would otherwise have been responsible, whether on board the said ship or any other ship belonging to or chartered by them or on shore or from unseaworthiness before or after the commencement of the voyage, or arose or developed during the voyage provided all means have been taken to make the vessel seaworthy. The shipowner's responsibility shall commence and cease at ship's tackles.

IN WITNESS WHEREOF, the Agent of said vessel hath signed THREE BILLS OF LADING, one of which being accomplished the others to stand void.

Dated at SEATTLE, WN, this 28th day of MARCH 30

FREIGHT			
4000 cases ~~XXXX~~ AT 70¢	PER CASE	$2800.00	
CU. FT. AT	PER TON		
LBS. AT	PER 2000		
LBS. AT	PER 2000		
LBS. AT	PER 2240		
BD. FT. AT	PER 1000		
BD. FT. AT	PER 1000		
FREIGHT PREPAID AS ARRANGED			
Total		$2800.00	

WESTFAL-LARSEN & CO. A/S.
By GENERAL STEAMSHIP CORPORATION, Agents

By .....

All of the provisions above and on the reverse side of this Bill of Lading are hereby agreed to

.....
Shipper.

B/L No. 13.

RATES, WEIGHT AND OR MEASUREMENT SUBJECT TO CORRECTION

Page 17 - "Exhibit A"

Stipulations and Conditions Referred to on Face Hereof and all of which are Agreed to by Shipper

4. The Carriers shall not be responsible to any extent for any loss, damage or delay arising from or consequent upon sweating, insufficiency or insecurity of package, in size, strength, or otherwise, [illegible] leakage, breakage, bending, chafage, wastage, spray, rust, frost, thaw, decay, hook marks or injury from hooks or ship's tackle, stowage, or contact with, or smell, evaporation, or other damage from any other goods, inaccuracies in, obliteration, insufficiency or absence of marks, numbers, or addresses, or description of goods shipped, injury to or soiling of wrappers or packages however caused.

5. The Carriers shall not be accountable or liable to any extent, for any loss of, injury or damage to bullion, specie, precious metals, manufactured or unmanufactured plated articles, jewelry, articles used for jewelry, precious stones, trinkets, watches, clocks, timepieces, mosaics, bills, bank notes of any country, orders, notes or securities for payment of money, stamps, maps, letters, writings, title deeds, paintings, engravings, pictures, statuary, silks, furs, lace or cashmere manufactured or unmanufactured, made up into clothes or otherwise, contained in any package or parcel, whatever may be the value of such articles, unless bills of lading in which value and contents are stated are signed therefore and ad valorem freight paid thereon. Specie will not be landed by the ship. It can only be delivered on presentation of Bills of Lading on board, and will be carried on at Consignee's risk if delivery is not taken during the steamer's stay in port.

6. Carrier is not and shall not be required to deliver said packages at port of delivery at any particular time or to meet any particular market or in time for any particular use; and shipper shall notify consignee or other person or forwarder or carrier at place of delivery to there receive packages as discharged at ship's tackles, and packages may be discharged immediately on arrival of vessel at port or anchorage or wharf or landing.

7. Also, in case the shipment hereunder is made from any port on the Pacific Ocean to any port on the Atlantic Ocean the carrier shall have the right to carry the same via Panama Canal or Straits of Magellan or Cape Horn, or as heretofore set forth to tranship.

8. Also, that the master of the vessel has the right of hiring lighters at the port of destination for the landing of the within goods at the expense and risk of owners of said goods, and if this in his judgment is inexpedient the goods to be taken from the ship's tackles where the ship's responsibility shall cease and to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master at the expense of the consignee, and at his risk of fire, loss or injury, as the authorities of the Port of Discharge shall direct. If by reason of the want or impossibility of obtaining lighters, in Master's opinion, the vessel is likely to be detained beyond the time required under ordinary circumstances to discharge the within goods he is at liberty to proceed on his voyage with the whole or any portion of the within goods remaining on board and to forward them to destination from the first convenient port he may subsequently call at, at the risk and expense of the consignee, and the carrier shall not be responsible for damage or loss as the consequence thereof.

9. Fish, fruit, vegetables and other perishable goods, earthenware, china, glass, crockery, or articles contained in glass or crockery, or castings, or any articles of a fragile nature are carried only at the risk of the shipper, owner or consignee absolutely.

10. Any goods or merchandise taken on deck shall be at the risk of the shipper, owner or consignee absolutely, and all goods may be carried in shelter deck, poop, bridge space, deck house, peaks or other space whatsoever.

11. Goods of an inflammable or explosive or corrosive or otherwise dangerous or injurious nature shall be distinctly [illegible] marked as to indicate their character before shipment, and be transported if the carriers choose on deck or elsewhere, and they shall in all cases be at the shipper's or owner's risk. If any such articles shall be delivered to the carriers without stating the character thereof and having the same distinctly and legibly marked upon the package or case containing the same, the shippers shall be responsible for any damage to other cargo and to the ship caused by such goods and such articles may be seized and confiscated or destroyed by the carriers, if deemed necessary without incurring any liability therefor. All fines, expenses, losses or damage which the carriers or their agents or servants or the ship or cargo may incur or suffer on account of incorrect [illegible] insufficient marking of the packages, or description of their contents, or other failure to comply with customs regulations or by reason of the inflammable, explosive, corrosive, or otherwise dangerous or injurious nature of such contents, shall be borne by and be recoverable from the owner, shipper or consignee, whether such owner, shipper or consignee shall be aware thereof or not.

12. Goods in refrigerator Steamer shall not be accountable for the condition of goods shipped under this Bill of Lading not for any loss or damage thereto arising from failure or breakdown of machinery, insulation or other appliances nor for detention nor for the consequence of any act, neglect, default or error of judgment of the Master, Officers, Engineers, Crew or other persons in the service of the Owners, nor for any other cause whatsoever and steamer shall be at liberty to jettison the whole or any part thereof if considered necessary on account of decomposition.

13. If the Carriers shall have exercised due diligence to provide a ship in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in the case of danger, damage or disaster, resulting from faults or errors in navigation or in the management of the ship, or from any defect in the ship, her machinery or appurtenances, or from unseaworthiness whether existing at the time of shipment or beginning or during the course of the voyage that the Carrier shall not be liable and that the consignees or owners of the cargo shall nevertheless pay salvage and any special charge incurred in respect of the cargo, and shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect and to the same extent as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any defect or unseaworthiness. In case of salvage services rendered to aforesaid goods or property during this voyage by a vessel or vessels of the Carriers, such salvage services shall be paid for as fully as if such salving vessel belonged to a third party. All claims of the nature of general average shall be adjusted and settled in conformity with York-Antwerp Rules, 1924, the ship reserving the right of lien on cargo for contribution, and adjustment shall be made in the United States of America unless the Carrier shall otherwise decide.

14. If by reason of blockade or interdict of the port of destination, war, disturbances, restrictions of quarantine, sanitary, customs, labor or other regulations, lock outs, strikes, trade disputes or labor disturbances, or any other reasonable cause, the entering of or discharging in the port of destination is in the opinion of the Master, likely to be prevented or [illegible] or the commencement, continuance or completion of the voyage is prevented or is considered by the Master in his absolute discretion unsafe and inadvisable the goods or any portion thereof may at the option of the Master and at the entire expense and risk of the owners of the goods either be discharged into quarantine depot hulk or other vessel required for the ship's dispatch, or transhipped to another vessel to be forwarded to destination, or landed or warehoused or otherwise disposed of as circumstances may admit, with power in the case of perishable goods to sell same by auction without reserve at the owner's risk, each or any of which things may be done at such port or place (including the port of shipment) as the Master may in his absolute discretion consider safe, suitable or convenient, or the Master may, notwithstanding the ship's arrival at port of destination, or the commencement of the discharge of the goods, proceed on his voyage and land the goods at any other port which he may consider safe, or may retain the goods on board until the ship's return all at the expense and risk of the owners of the goods, and the ship's responsibility shall cease when the goods are discharged into the hands of the port authorities, or into other proper or safe keeping, or according to the custom of the port, or where perishable goods are sold as aforesaid the Master gives notice as soon as practicable to the Consignees or shippers of the goods so far as they can be ascertained. The Company shall not be responsible for loss or damage of any kind which may result directly or indirectly from any of the above clauses. Freight when payable by shippers is to be considered as earned notwithstanding the non-completion of the voyage under any of the above circumstances. When the freight is payable by the Consignee and the goods are discharged other than at the port of destination under the provisions of this clause, the consignee or the shipper at the option of the Company shall be liable for freight at the ordinary rate charged by the Company for carriage of similar goods from port of shipment to the actual port of discharge, or if there be no such ordinary rate, or if the goods be returned to the port of shipment then such consignee or shipper shall be liable for freight at a rate which bears the same proportion to the freight which would have been payable if the voyage had been completed which the mileage actually traversed bears to the mileage which would in such case have been traversed. The Company shall have lien on the goods for all freight charges and expenses payable by the consignee or shipper thereof under the provisions of this clause.

15. In case of any loss or damage for which the Company or connecting carrier may be liable, it shall receive the benefit of any insurance upon such goods in favor of the shipper, owner or consignee, and to any payments made by or on behalf of the insurers thereof whether under the guise of advances, loans, or otherwise, even though the said loss or damage occurs while the said vessel is deviating from the voyage. The Carrier shall not be liable for any claim whatsoever unless written notice thereof shall be given to the Carrier upon removal of the goods from the wharf. No suit to recover for loss or damage shall in any event be maintainable against the Carrier unless instituted within three months after giving written notice as above provided. The Carrier shall not be liable for claims for damage or detention to goods, whether under through bills of lading or otherwise where the damage is done or detention occurs whilst the goods are not in the possession of the Carrier; and all claims for loss of or damage or injury to any goods or property, for which the Carriers are liable under the terms hereof, shall be adjusted upon the basis of the invoice value of the said goods or property or of the market value of goods or property of the same nature and quality at the place and time of original shipment, unless the invoice or declared value of the said goods or property or the sound market value of said goods or property at the time and place of delivery shall be less than such invoice or market value, in which case such invoice or declared value or such sound market value, at time and place of delivery (whichever shall be the less) shall be the maximum liability. It is mutually agreed that the value of each package shipped hereunder does not exceed the sum of one hundred dollars ($100), on which basis the freight is adjusted and the carrier's liability shall in no respect, exceed that sum unless a value in excess thereof be declared and stated herein and extra freight, as may be agreed upon, paid. And in the event of partial loss and/or damage for which the carrier may be responsible, the liability to be prorated to the sum payable in excess of the total amount of loss or damage calculated in accordance with the above conditions. Any claim and/or legal proceedings of whatsoever nature for loss or damage howsoever arising out of this bill of lading shall, in the option of the Company, be dealt with in San Francisco, California, according to the laws of the United States of America, to the exclusion of proceedings in any court or courts in any other country or countries.

16. Full freight is payable on damaged or unsound goods; freight if payable at any other place than at destination to be paid, ship or goods lost or not lost, and whether the voyage be complete or not and to be due in full exchange for Bill of Lading, or if payable by consignee on arrival of goods at place of destination in exchange for delivery order; settlement in either case to be made without discount or abatement; freight and disbursements payable by consignees in United States Gold Coin or its equivalent in local currency, at the banks demand rate of exchange on New York on date of steamer's arrival at port of discharge of said goods; freight on goods to order, liquids and brittle or perishable goods to be paid by shippers if required; this Bill of Lading duly endorsed to be given up in exchange for delivery order if required; the carriers shall have a lien on the goods or property not only for all freight and other charges to be paid under the provisions hereof and for all payments made and liabilities incurred in respect of any fines, damages, or other charges of whatsoever nature which under the provisions hereof are to be borne by the owner, shipper or consignee of the goods or property but for all previously unsatisfied freight charges, fines, damages and other charges of whatsoever nature due to him or them by the said owner, shipper or consignor and whether payable in advance or not.

17. The shippers and buyers of the goods are liable jointly and severally for all freight and charges payable under the terms hereof, and for all other expenses incurred in the event of goods or property being sold to enforce the aforesaid lien or by reason of being unclaimed or refused by consignees and not realizing sufficient to pay such freight and charges in full, freight at the rate herein stated and all other charges accruing on said goods must be paid before delivery and according to weights or measurements as ascertained by any carrier hereunder, and if upon inspection, it is ascertained that the articles shipped are not those described in this Bill of Lading, double freight charges must be paid upon the articles actually shipped, and at the rates properly applicable. The goods are to be discharged from this ship as soon as she is ready to unload and if the consignee is not ready to receive they may be discharged by the master on to the wharf, or into hulk, lazaretto, or hired lighters, if necessary at the expense and risk of the owners of the goods. The ship may, irrespective of weather, discharge continuously, Sundays and holidays included, and should the master or agents require discharge to be made beyond the usual custom hours, consignees shall be bound, [illegible] to immediately sign an application for this purpose. The portage of the delivery of the cargo whether by day or night, including the cubage of all goods carried by measurement and weighing of all goods carried by weight, shall at the option of the ship, be done by the consignees or the ship at their tariff rates, at the expense and risk of the owners of the goods.

18. The goods or property during lighterage from vessel to vessel or between the vessel and shore and while on any wharf, hulk or raft, or in any warehouse awaiting shipment, reshipment or transhipment shall be at the risk of the owner, shipper or consignee absolutely.

19. With respect to livestock the ship shall provide only water and stalls or other necessary pens or enclosures, shipper shall provide necessary feed and attendance for such livestock from the time taken on board ship until landed at destination, feed for livestock shall be carried on board ship freight free, except that any surplus feed landed at destination shall pay freight at current rates, freight charges on livestock must in all cases, unless otherwise specially arranged, be paid in advance on each and every head of livestock taken on ship, and freight so paid cannot be returned, ship [illegible] or livestock lost or not lost. The Carriers shall not be held liable for injuries to or loss of live stock howsoever caused, the same being carried at the shipper's risk absolutely, even in case of neglect of Carrier's servants or of unseaworthiness or unfitness. Freight is payable on number shipped.

20. Freight prepaid or payable in advance to be considered as earned, steamer or goods lost, or not lost.

21. Unless shipper, owner or consignee makes Customs Import Entry at ports of call, the carriers may make such entry and add cost of making such entry to the charges shown on this Bill of Lading.

22. NOTIFICATION CLAUSE — No claim shall under any circumstances whatever attach to the ship or its owners or agents for failure to notify consignees of arrival of goods.

23. Nothing herein contained shall prevent the shipowners from claiming the benefits of the United States Revised Statutes, Sections 4281 to 4287, and the rules from time to time made thereunder and of the provisions of the Act of Congress of the United States approved on the 13th day of February, 1893, entitled "An act relating to Navigation of Vessels, &c." Provided that in all cases where merchandise or property is transported under this contract from or between ports of the United States and foreign ports within the meaning of the said Act of Congress of 1893, and proceedings are taken against the company or vessel carrying the goods, then the provisions of the said Act of Congress and Revised Statutes shall be held to apply to this contract, and the shipment [illegible] and all exemptions from liability [illegible] and any provisions of this Bill of Lading [illegible] in the said Act of Congress and Revised Statutes [illegible] shall be treated as struck out and expunged.

24. This Bill of Lading, when issued covering [illegible] from a Canadian port, is subject to all the terms and provisions of and all the exemptions from liability contained in the Water Carriage of Goods Act, 1910.

25. In case of delivery to a [illegible] Carrier [illegible] shall be several and shall end at [illegible] upon delivery [illegible] considered a [illegible] If [illegible] Carrier beyond [illegible] delivery [illegible] to other [illegible] Carrier of [illegible] freight as may [illegible] when such packages shall be laden on board of said merchandise by water shall be [illegible] other Carrier's vessel or [illegible] Carrier's vessel [illegible] Goods are subject [illegible] incurred for storage, cartage, or to delay at port of transhipment and [illegible] other expenses to be borne by [illegible] owners of the [illegible].

26. Should any existing or future [illegible] governmental authorities prevent the above goods being conveyed in a particular ship or class of ships, the carriers are to be free from any liability [illegible].

27. Any alteration, addition or [illegible] Bill of Lading shall be [illegible] or initialed in the margin by an Agent of the Carrier [illegible] shall be deemed [illegible] this Bill [illegible] shall [illegible].

AND FINALLY in accepting this Bill of Lading, the Shipper, Owner and Consignee of the goods and the holder of the Bill of Lading [illegible] stipulations, exceptions and conditions [illegible] written, printed or stamped, [illegible] as if they were all signed by such Shipper, Owner, Consignee or Holder.

PACIFIC MAN FOLD [illegible] CO. LOS ANGELES EMERYVILLE CALIF. SEATTLE 28 .01

[Endorsed]: Receipt of a copy of the within answer is hereby admitted this 23rd day of September, 1930.

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for Libelant.

Filed Sep. 23, 1930. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [54]

[Title of Court and Cause No. 20336-L.]

LIBELANT'S EXCEPTIONS TO ANSWER.

Libelant herein excepts to the Answer of Respondents as follows:

FIRST: Libelant excepts to respondents' first further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

SECOND: Libelant excepts to respondents' first further and separate defense on the ground that said alleged defense is uncertain and indefinite in that it does not appear therein, nor can it be ascertained therefrom, how, or for what reason, the numerous bill of lading exceptions set forth in said alleged defense are applicable to, or constitute a defense against, the cause of action set forth in the libel herein.

THIRD: Libelant excepts to respondents' second further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

FOURTH: Libelant excepts to the allegation of

respondents' second further and separate defense in the following words, to-wit: [55]

> "That by the terms and conditions of the said bill of lading it is specifically provided that the vessel shall have liberty, after proceeding towards the port of discharge, to proceed to the said port via any port or ports in any order or rotation, outwards or forward, whether in or out of, or in a contrary direction to, or beyond the customary or advertised route, without the same being deemed a deviation, whatever may be the reason for calling at, or entering said port or ports; * * *"

on the ground that said allegation is impertinent.

FIFTH: Libelant excepts to respondents' third further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

SIXTH: Libelant excepts to respondents' fourth further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

SEVENTH: Libelant excepts to respondents' fifth further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

EIGHTH: Libelant excepts to respondents' sixth further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

NINTH: Libelant excepts to respondents' seventh further and separate defense on the ground

that said alleged defense does not state facts sufficient to constitute a defense to said libel.

TENTH: Libelant excepts to respondents' eighth further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

WHEREFORE, libelant prays that its exceptions to respondents' Answer be sustained and the defenses excepted to [56] be stricken from said Answer.

CARL R. SCHULZ,
MILTON D. SAPIRO,
Proctors for libelant.

Dated: October 10, 1930.

[Endorsed]: Due service and receipt of a copy of the within is hereby admitted this 11th day of Oct. 1930.

LILLICK, OLSON & GRAHAM,
Proctors for Respondents.

Filed Oct. 11, 1930. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday the 3rd day of November, in the year of our Lord one thousand nine hundred and thirty one.

Present: The Honorable, HAROLD LOUDERBACK, Judge.

No. 20336

POULTRY PRODUCERS OF CENTRAL CALIF.,

vs.

Motorship "HINDANGER", etc.

(ORDER OVERRULING EXCEPTIONS TO ANSWER)

The Libelant's exceptions to the answer, having been heretofore submitted, being now fully considered, it is ordered that said exceptions be and the same are hereby overruled. [58]

[Title of Court and Cause No. 20337-S.]

LIBELANT'S EXCEPTIONS TO ANSWER.

Libelant herein excepts to the Answer of Respondents as follows:

FIRST: Libelant excepts to respondents' first further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

SECOND: Libelant excepts to respondents' first further and separate defense on the ground that said alleged defense is uncertain and indefinite in that it does not appear therein, nor can it be ascertained therefrom, how, or for what reason, the numerous bill of lading exceptions set forth in said

alleged defense are applicable to, or constitute a defense against, the cause of action set forth in the libel herein.

THIRD: Libelant excepts to respondents' second further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

FOURTH: Libelant excepts to the allegation of [59] respondents' second further and separate defense in the following words, to-wit:

> "That by the terms and conditions of the said bill of lading it is specifically provided that the vessel shall have liberty, after proceeding towards the port of discharge, to proceed to the said port via any port or ports in any order or rotation, outwards or forward, whether in or out of, or in a contrary direction to, or beyond the customary or advertised route, without the same being deemed a deviation, whatever may be the reason for calling at, or entering said port or ports: * * * "

on the ground that said allegation is impertinent.

FIFTH: Libelant excepts to respondents' third further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

SIXTH: Libelant excepts to respondents' fourth further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

SEVENTH: Libelant excepts to respondents'

fifth further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

EIGHTH: Libelant excepts to respondents' sixth further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

NINTH: Libelant excepts to respondents' seventh further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel.

TENTH: Libelant excepts to respondents' eighth further and separate defense on the ground that said alleged defense does not state facts sufficient to constitute a defense to said libel. [60]

WHEREFORE, libelant prays that its exceptions to respondents' Answer be sustained and the defenses excepted to be stricken from said Answer.

CARL R. SCHULZ.
MILTON D. SAPIRO.
Proctors for Libelant.

Dated: October 10, 1930.

[Endorsed]: Due service and receipt of a copy of the within is hereby admitted this 11th day of Oct. 1930.

LILLICK, OLSON & GRAHAM.
Proctors for Respondents.

Filed Oct. 11, 1930. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday the 3rd day of November, in the year of our Lord one thousand nine hundred and thirty one.

Present: The Honorable Harold Louderback, Judge.

No. 20337

WASHINGTON CO-OP. EGG & POULTRY ASSOCIATION,

vs.

MOTORSHIP "HINDANGER", ETC.,

(ORDER OVERRULING EXCEPTIONS TO ANSWER.)

The Libelant's Exceptions to the Answer, having been heretofore submitted, being now fully considered, it is ordered that said Exceptions be and same are hereby overruled. [61]

[Title of Court and Cause No. 20336-L.]

NOTICE OF OVERRULING EXCEPTIONS TO ANSWER.

To Poultry Producers of Central California, a corporation, and to Carl R. Schulz and Milton D. Sapiro, its proctors:

You, and each of you, will PLEASE TAKE NOTICE, and you are hereby notified, that on Tuesday,

the 3rd day of November, 1931, the exceptions to the answer in the above entitled cause were overruled by the above entitled court.

Dated: November 4, 1931.

LILLICK, OLSON & GRAHAM,
Proctors for Respondents.

[Endorsed]: Filed Nov. 5, 1931. Walter B. Maling, Clerk. [62]

[Title of Court and Cause No. 20337-L.]

NOTICE OF OVERRULING EXCEPTIONS TO ANSWER.

To Washington Cooperative Egg and Poultry Association, a corporation, and to Carl R. Schulz and Milton D. Sapiro, its proctors:

You, and each of you, will PLEASE TAKE NOTICE, and you are hereby notified, that on Tuesday, the 3rd day of November, 1931, the exceptions to the answer in the above entitled cause were overruled by the above entitled court.

Dated: November 4, 1931.

LILLICK, OLSON & GRAHAM,
Proctors for Respondents.

[Endorsed]: Due service and receipt of a copy of the within is hereby admitted this 5th day of November, 1931.

CARL R. SCHULZ,
MILTON D. SAPIRO,
Proctors for Libelant.

Filed Nov. 5, 1931. Walter B. Maling, Clerk. [63]

[Title of Court and Cause No. 20336-L.]

STIPULATION.

It is hereby stipulated and agreed that the motorship "Hindanger", seized under process issued under the above entitled cause, may be released upon the filing of an admiralty stipulation in the sum of Sixteen Thousand ($16,000.) Dollars.

Dated: August 15, 1930.

CARL SCHULZ,
MILTON SAPIRO,
Proctors for Libelant.

LILLICK, OLSON & GRAHAM,
Proctors for Claimant and Respondents.

[Endorsed]: Filed Aug. 15, 1930, Walter B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk. [64]

[Title of Court and Cause No. 20336-L]

INTERROGATORIES PROPOUNDED BY RESPONDENTS TO LIBELANT TO BE ANSWERED UNDER OATH BY LIBELANT.

1. Please state in detail the terms of the oral contract alleged to have been entered into between the parties as set forth in paragraph VI of the libel herein.

2. Please state in detail the voyage alleged to have been agreed upon as set forth in paragraph IX of the libel herein.

3. Please state in detail wherein the voyage made by the "HINDANGER" was different from the voyage alleged to have been agreed upon.

4. Please state in detail wherein, and in what manner, and to what ports and places the said Motorship "HINDANGER" deviated as alleged in paragraph XI of the said libel.

5. Please name the person or persons in the employ of respondents or either of them with whom the said alleged oral contract was made. [65]

6. Please state the date upon which said alleged oral contract was made.

LILLICK, OLSON AND GRAHAM
Proctor for Respondents.

IT IS HEREBY ORDERED that the foregoing interrogatories be answered by libelant at least two days prior to the hearing herein and that the hearing of the matter set forth in the libel be stayed until such interrogatories be answered .

.....
United States District Judge.

Dated: April 30th, 1932.

[Endorsed]: Receipt of a copy of the within Inter'rs. is hereby admitted this 30 day of April, 1932.

CARL R. SCHULZ
MILTON D. SAPIRO
Proctor for Libelant

Filed Oct 22 1932 Walter B. Maling, Clerk. [66]

[Title of Court and Cause No. 20336-L]

ANSWERS TO INTERROGATORIES PROPOUNDED BY THE RESPONDENTS, TO BE ANSWERED BY LIBELANT UNDER OATH.

Answering the said interrogatories in the order in which they appear:

To the First Interrogatory: The terms of the oral agreement between the parties were: Pacific Egg Producers Cooperative, Inc., as agent for libelant and Washington Cooperative Egg and Poultry Association, agreed to furnish, and respondent agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "HINDANGER", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco, April 2, 1930. Respondents [67] thereafter notified Pacific Egg Producers Cooperative, Inc. in behalf of libelant that said motorship "HINDANGER" would load about March 24, 1930, from Seattle, and April 4, 1930, from San Francisco, thereby definitely fixing the time agreed for loading.

To the Second Interrogatory: No allegation as to any voyage is contained in paragraph IX of the libel but if by interrogatory Number Two is meant the

voyage generally alleged in the libel to have been agreed upon, said voyage was a voyage to take about thirty-five (35) days from the port of San Francisco, calling at the ports of Rio de Janeiro, Santos, Buenos Aires and Montevideo, Rosario and Santa Fe (if inducement offered), the stay at Montevideo not to exceed one day in duration.

To the Third Interrogatory: The voyage actually made by the "HINDANGER" differed from that agreed upon in the following respects:

(a) That said "HINDANGER" did not sail about March 20, 1930, from Seattle, but sailed on March 28, 1930.

(b) That said "HINDANGER" was not ready to load at San Francisco on April 4, 1930, as agreed, and was not ready to load until April 9, 1930.

(c) That said voyage was not of a duration of thirty-five days from San Francisco to Buenos Aires, as agreed upon, but said voyage was of a duration of forty-nine days from San Francisco.

(d) That said vessel called at the ports of Pernambuco and Bahia, both in Brazil, contrary to said agreement.

(e) That said vessel remained at the port of Montevideo [68] for eight days instead of one day as agreed.

To the Fourth Interrogatory: Said Motorship "HINDANGER" deviated as alleged in paragraph XI of the said libel in the following respects:

(a) That said voyage was not of a duration of thirty-five days from San Francisco to Buenos Aires, as advertised and agreed upon, but said voyage was

of a duration of sixty-two days from Seattle and forty-nine days from San Francisco.

(b) That said vessel called at the ports of Pernambuco and Bahia, both in Brazil, contrary to said agreement.

(c) That said vessel remained at the port of Montevideo for eight days instead of one day as agreed.

To the Fifth Interrogatory: The said oral contract was made with someone in the San Francisco office of the General Steamship Company. Libelant believes that the party with whom the agreement was made was Mr. R. S. Wintemute of the General Steamship Company.

To the Sixth Interrogatory: Said oral contract was completed on or about March 10, 1930, based upon negotiations had between January 27, 1930 and March 10, 1930.

MILTON D. SAPIRO
CARL R. SCHULZ
Proctors for Libelant. [69]

State of California,
City and County of San Francisco.—ss.

G. H. Schilling, being duly sworn on behalf of the libelant corporation in the above-entitled action, says that he is the Secretary of said corporation; that he has read the foregoing answers to interrogatories propounded by respondents and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those

matters that he believes it to be true.

G. H. SCHILLING.

Subscribed and sworn to before me this 5th day of May, 1932.

[Seal] KATHRYN E. STONE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 22, 1932. Walter B. Maling, Clerk. [70]

[Title of Court and Cause No. 20336-L.]

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto and their respective proctors that the following may be deemed to have been proved and may be considered by the above entitled court in the above entitled cause with the same force and effect as though proved by question and answer under oath:

1. It is admitted that the bill of lading covering the shipment set forth in the libel and answer is in the words and phrases of Exhibit A, page 17, of the answer to the libel.

2. The corporate existence of the libelant is admitted.

3. It is admitted that the voyage of the "HINDANGER" and the dates of arrival and departure from the time of departure from Seattle, Washington, until arrival at Buenos Aires, Argentine, were as follows: [71]

1930			
March	28	Sailed Seattle, Washington	9 p. m.
March	30	Arrived Rainier	2 a. m.
April	1	Sailed Columbia River	6 p. m.
April	2	Arrived Grays Harbor	10 a. m.
April	6	Sailed Grays Harbor	6 p. m.
April	8	Arrived San Francisco	8 p. m.
April	10	Sailed San Francisco	5:30 p. m.
April	12	Arrived Los Angeles	7 a. m.
April	13	Sailed Los Angeles	2 p. m.
April	24	Sailed Colon	a. m.
May	7	Arrived Pernambuco	8 a. m.
May	8	Sailed Pernambuco	5 a. m.
May	10	Arrived Bahia	6:15 a. m.
May	12	Sailed Bahia	4 p. m.
May	15	Arrived Rio de Janeiro	11 a. m.
May	16	Sailed Rio de Janeiro	noon
May	17	Arrived Santos	8 a. m.
May	17	Sailed Santos	7 p. m.
May	21	Arrived Montevideo	11 a. m.
May	29	Sailed Montevideo	5 p. m.
May	29	Arrived Buenos Aires	noon

4. It is admitted that the statement of the schedule of ports and voyages, times of arrival and departure, as set forth in Exhibit B, page 15, of the answer to the libel is true and correct.

5. It is admitted that no claim was filed or notice thereof given to the carrier, or to anyone, prior to the removal of the goods from the wharf.

6. The parties hereto admit the ownership of the goods by the libelant at all times alleged in the libel.

7. The parties hereto admit the ownership of the [72] vessel by Westfal-Larsen & Co.

8. It is admitted that the General Steamship Corporation is, and was, the agent of Westfal-Larsen & Co. for all purposes expressed in the libel, and with full authority to act on the matters set forth therein, and, being such agent, is not responsible for any damages found due herein.

9. It is admitted that the dates of shipment and arrival of the goods and the place of shipment and arrival as set forth in the libel are correct.

10. The parties hereto admit the incorporation of Pacific Egg Producers Cooperative, Inc., and admit that the Pacific Egg Producers Cooperative, Inc., is the agent for the libelant.

11. It is agreed that "The Guide" contained* advertisements (Exhibit "A") relative to the motorship "HINDANGER", and on the dates listed herein showed the scheduled sailings of the "HINDANGER" as follows:

Date "Ad" changed	Seattle	Portland	San Francisco	Los Angeles
Jan. 2, 1930	Mar. 8	Mar. 14	Mar. 18	Mar. 20
" 15 "	" 10	" 17	" 21	" 23
Feb. 8, 1930	" 17	" 25	Apr. 2	Apr. 4
" 26 "	" 20	" 28	" 2	" 4
Mar. 18 "	" 25	" 30	" 5	" 8
" 21 "	" 25	Apr. 1	" 5	" 8
" 28 "	" 28	" 3	" 7	" 10
" 31 "	Sld " 28	" 3	" 7	" 10
Apr. 3 "	" " 28	Sld " 2	" 7	" 10
" 5 "	" " 28	" " 2	" 8	" 10
" 7 "	" " 28	" " 2	" 10	" 12
" 11 "	" " 28	" " 2	Sld " 10	" 12

*See Case No. 20337-L for Exhibit "A".

MILTON D. SAPIRO and
CARL R. SCHULZ,
Proctors for Libelant.
LILLICK, OLSON & GRAHAM,
Proctors for Respondents. [73]

[Endorsed]: Filed Oct. 22, 1932. Walter B. Maling, Clerk. [74]

[Title of Court and Cause No. 20337-L.]

STIPULATION.

It is hereby stipulated by and between the parties hereto and their respective proctors that the following may be deemed to have been proved and may be considered by the above entitled court in the above entitled cause with the same force and effect as though proved by question and answer under oath:

1. It is admitted that the bill of lading covering

the shipment set forth in the libel and answer is in the words and phrases of Exhibit A, page 17, of the answer to the libel.

2. The corporate existence of the libelant is admitted.

3. It is admitted that the voyage of the "HINDANGER" and the dates of arrival and departure from the time of departure from Seattle, Washington, until arrival at Buenos Aires, Argentine, were as follows: [75]

1930

March	28	Sailed Seattle, Washington	9 p. m.
March	30	Arrived Rainier	2 a. m.
April	1	Sailed Columbia River	6 p. m.
April	2	Arrived Grays Harbor	10 a. m.
April	6	Sailed Grays Harbor	6 p. m.
April	8	Arrived San Francisco	8 p. m.
April	10	Sailed San Francisco	5:30 p. m.
April	12	Arrived Los Angeles	7 a. m.
April	13	Sailed Los Angeles	2 p. m.
April	24	Sailed Colon	a. m.
May	7	Arrived Pernambuco	8 a. m.
May	8	Sailed Pernambuco	5 a. m.
May	10	Arrived Bahia	6:15 a. m.
May	12	Sailed Bahia	4 p. m.
May	15	Arrived Rio de Janeiro	11 a. m.
May	16	Sailed Rio de Janeiro	noon
May	17	Arrived Santos	8 a. m.
May	17	Sailed Santos	7 p. m.
May	21	Arrived Montevideo	11 a. m.
May	29	Sailed Montevideo	5 p. m.
May	29	Arrived Buenos Aires	noon

4. It is admitted that the statement of the schedule of ports and voyages, times of arrival and departure, as set forth in Exhibit B, page 15, of the answer to the libel is true and correct.

5. It is admitted that no claim was filed or notice thereof given to the carrier, or to anyone, prior to the removal of the goods from the wharf.

6. The parties hereto admit the ownership of the goods by the libelant at all times alleged in the libel.

7. The parties hereto admit the ownership of the [76] vessel by Westfal-Larsen & Co.

8. It is admitted that the General Steamship Corporation is, and was, the agent of Westfal-Larsen & Co. for all purposes expressed in the libel, and with full authority to act on the matters set forth therein, and, being such agent, is not responsible for any damages found due herein.

9. It is admitted that the dates of shipment and arrival of the goods and the place of shipment and arrival as set forth in the libel are correct.

10. The parties hereto admit the incorporation of Pacific Egg Producers Cooperative, Inc., and admit that the Pacific Egg Producers Cooperative, Inc., is the agent for the libelant.

11. It is agreed that "The Guide" contained advertisements (Exhibit "A") relative to the motorship "HINDANGER", and on the dates listed herein showed the scheduled sailings of the "HINDANGER" as follows:

Date "Ad" changed	Seattle	Portland	San Francisco	Los Angeles
Jan. 2, 1930	Mar. 8	Mar. 14	Mar. 18	Mar. 20
" 15 "	" 10	" 17	" 21	" 23
Feb. 8, 1930	" 17	" 25	Apr. 2	Apr. 4
" 26 "	" 20	" 28	" 2	" 4
Mar. 18 "	" 25	" 30	" 5	" 8
" 21 "	" 25	Apr. 1	" 5	" 8
" 28 "	" 28	" 3	" 7	" 10
" 31 "	Sld " 28	" 3	" 7	" 10
Apr. 3 "	" " 28	Sld " 2	" 7	" 10
" 5 "	" " 28	" " 2	" 8	" 10
" 7 "	" " 28	" " 2	" 10	" 12
" 11 "	" " 28	" " 2	Sld " 10	" 12

CARL R. SCHULZ and
MILTON D. SAPIRO,
Proctors for Libelant.
LILLICK, OLSON and GRAHAM,
Proctors for Respondents. [77]

EXHIBIT "A"

"THE GUIDE"
Is issued daily except Sundays and Holidays, by The Guide
Office: 625 California Street. Phones. DAvenport
WILLIAM C. HEPBY, ... Pres.

GENERAL STEAMSHIP CORPORATION

"Worldwide Service—At Your Service"

BRISBANE—SYDNEY—NEWCASTLE—MELBOURNE—ADELAIDE

TRANSATLANTIC STEAMSHIP CO., Ltd. GOTHENBURG, SWEDEN

Pacific--Australia Direct Line

Vessels	Passengers and Freight	From Portland	Seattle	Vancouver, B.C.	Due Frisco	Due Los Angeles
S.S. STDIC ...	(Brisbane, Sydney, Newcastle, Melbourne, Adelaide)	Mar 3	(omits)	(omits)	Mar 14	Mar 18
MS KEOPUS	(Brisbane, Sydney, Melbourne and Adelaide)	Mar 16	Mar 20	Mar 21	Mar 31	Apr 5
MS. PHILLARIS	(Brisbane, Sydney, Melbourne and Adelaide)	Apr 17	Apr 21	Apr 22	Apr 30	(omits)
MS. TYNDRUM	(Brisbane, Sydney, Melbourne and Adelaide)	(omits)	(omits)	(omits)	Apr 25	Apr 29
S.S. [illegible]	(Brisbane, Sydney and Melbourne)	May —	May —	May —	May —	May —

(*)—18 days in Australia (Thru Bills of Lading to Australian and Tasmania ports) (4 Receives Mar 4, Pier 43)

EAST COAST of SOUTH AMERICA

Westfal-Larsen Company Line

RIO de JANEIRO, SANTOS, BUENOS AIRES and MONTEVIDEO

ROSARIO and SANTA FE (If inducements offer)

Passengers, Freight and Refrigeration

From North Pacific ports to South America (via Panama Canal)				From South American ports to North Pacific (via Santos and Panama Canal)			
From Seattle-Portland—San Frac—Los Ang				From Buenos Aires—Santos—Due L. A.-Due S. F.			
MS. VILLANGER	4 sld Feb 25	sld Mar 1	Mar 9	Mar 7	MS. HINDANGER	sld Jan 31 sld Feb 28	Mar 9	Mar 13
MS HINDANGER	Mar 25	Mar 29	Apr 3	Apr 4	MS. BRIMANGER	Mar 28	Mar 28	Apr 22
MS BRIMANGER	Mar 8	May 14	May 20	May 22	MS VILLANGER	Apr 25	Apr 28	May 10	Jan 1
MS. TARANGER	May —	May —	Jun —	Jun —	MS. HINDANGER	Jun 25	Jun 28	July 15	July 17

(†Receives Feb 28, Pier 41) (*—Loading Vancouver, B. C Feb 14)

MEDITERRANEAN

Navigazione Libera Triestina, S. A., Trieste, Italy

NORTH PACIFIC PORTS

TO

Barcelona, Marseilles, Genoa, Leghorn, Naples, Venice and Trieste

Passengers, Freight and Refrigeration

From Seattle-Vanc, BC-Portld-San Frac-Los Ang				
MS. LEMS	(3) Mar 4	Mar 13	Mar 17	Mar 26	Mar 29
MS. PELTRE	(3) Mar 25	Apr 5	Apr 9	Apr 12	Apr 14
MS RIALTO	(3) Apr 26	May 3	May 6	May 10	May 13
MS. PELLA	(3) May 26	May 31	Jun 3	Jun 7	Jun 9

(Through Bills of lading issued to African ports via Italy)

(4—Receives ——, Pier 41) (3)—Refrigerator space 0

FRENCH LINE

CONTINENTAL PORTS

HAVRE, DUNKIRK, BORDEAUX and ANTWERP

(Other ports if inducements offer)

Passengers, Freight and Refrigeration

From San Frac—Los Ang		
S.S. WISCONSIN (new)	(3)(1)	Mar 13	Mar 16
S.S. ARKANSAS	(3)	Mar 24	Mar 28
MS. WASHINGTON (new)	(3)(4)	Apr 12	Apr 14
S.S. INDIANA	(3)	Apr 17	Apr 21
S.S. WYOMING (new)	(3)(1)	May 13	May 16

(C—Receives Mar 6, Pier 41) (3)—Passengers & Refrigeration (1)—Calls Central America

GENERAL STEAMSHIP CORPORATION

240 Battery Street —— Pier 41 —— Telephone KEarny 4100.

KERR LINES—"SILVER FLEET"

Regular Direct Service, General and Refrigerated Cargo

—— TO ——	—— TO ——
Yokohama, Kobe, Shanghai, Manila Port Swettenham and Penang	Macassar, Soerbaya, Samarang, Batavia, Singapore, Belawan and Calcutta

From Los Ang.	San Fran	From Los Ang.	San Fran
MS. SILVERCRAVA	(1-5-6) Mar 31	(omits)	MS. SILVERLARCH	(1) Mar 4	Mar 13
MS. SILVERYEW	(1) (omits)	Mar 31	MS. SILVERYEW	(1-6) (omits)	Mar 28
MS. SILVERBEECH	(1-3) (omits)	Apr 6	MS. SILVERSPRUCE	Mar 25	Mar 27
MS. SILVERHOLLY	(1-3) (omits)	Apr 12	MS. SILVERBEECH	(3) (omits)	Apr 5
MS. SILVERMAPLE	(1-3) (omits)	May 8	MS. SILVERELM	Apr 18	Apr 21

(1)-Refrigerator (3)-Calls Calcutta (5)-omits Calcutta (6)-Calls Colombo (6)-omits Penang (4 Rec Mar 6, Pier 41)

240 Battery Street **GENERAL STEAMSHIP CORP., Pacific Coast Agents** Tel. KEarny 4100

ORIENT PACIFIC COAST JOINT SERVICE

[Endorsed]: Filed Oct. 22, 1932. Walter B. Maling, Clerk. [79]

In the Southern Division of the United States District Court in and for the Northern District of California

First Division — In Admiralty

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION, a corporation,
Libelant,
vs.
Motorship "HINDANGER", her engines, boilers, tackle, etc., WESTFAL-LARSEN & CO., a corporation; GENERAL STEAMSHIP CORPORATION, a corporation,
Respondents.
No. 20337-L

POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a corporation,
Libelant,
vs.
Motorship "HINDANGER", her engines, boilers, tackle, etc., WESTFAL-LARSEN & CO., a corporation; GENERAL STEAMSHIP CORPORATION, a corporation,
Respondents.
No. 20336-L

REPORT.

Pursuant to an order of this Court, the undersigned, as Special Master, has taken testimony in

the above matters, and I now have the honor to report as follows:

There are two libels involved in this proceeding. In [80] one of these actions (Docket No. 20336-L), the Poultry Producers of Central California, a corporation, is libelant; in the other, (Docket No. 20337-L), the Washington Cooperative Egg and Poultry Association is libelant. In both libels the Motorship "HINDANGER", her engines, etc.; the Westfal-Larsen & Co., a corporation; and the General Steamship Corporation, a corporation, are named as respondents.

The General Steamship Company, a corporation, has been dismissed, by stipulation, in each action.

The libelant in each proceeding seeks to recover damages for the failure of the respondents to deliver eggs to Buenos Aires, Argentine Republic, within the time provided in an alleged oral contract of affreightment; the respondents deny the existence of such an oral contract and contend that the sole agreements are the bills of lading.

After a series of preliminary negotiations regarding space, rates, sailing time, etc., had been conducted between representatives of the libelants and representatives of the respondent Westfal-Larsen Company, the libelant, Washington Cooperative Egg and Poultry Association, shipped 4,000 cases of eggs on the said motorship "HINDANGER"; and the libelant, Poultry Producers of Central California, shipped 11,000 cases of eggs on board the same vessel.

The 4,000 cases shipped by the Washington Co-

operative Egg and Poultry Association were placed on board the "HINDANGER" in Seattle, Washington, on or about March 28, 1930; the 11,000 cases shipped by the Poultry Producers of Central California were placed on board the "HINDANGER" in San Francisco, California, on or about April 7, 1930.

The "HINDANGER" sailed from San Francisco on or about [81] April 10, 1930, and arrived in Buenos Aires on May 29, 1930.

During the journey to Buenos Aires, after leaving San Francisco on April 10, 1930, the "HINDANGER" called and stopped (in rotation) at the following ports, to wit: San Pedro, California, Pernambuco, Bahia, Rio de Janeiro, Santos, Montevideo, and, as indicated above, arrived in Buenos Aires on May 29, 1930.

Libelants contend that, by virtue of an alleged oral contract, entered into on March 10, 1930, the "HINDANGER" should have sailed from San Francisco on April 4, 1930, and should have arrived at Buenos Aires within thirty-five days thereafter.

I find that there was no oral contract entered into between the parties. It is true that, prior to the shipments, there were a series of preliminary conferences and meetings in which rates, sailing schedules, etc., were discussed. There was, however, no definite "meeting of minds". No oral contracts were consummated between the parties.

The testimony shows that the "HINDANGER" is a motorship devoted to the carrying of general

cargo. On the voyage in question the said vessel stopped at certain ports en route to Buenos Aires. These different calls were made at ports in geographical rotation, and for the essential purposes of discharging goods and merchandise consigned to the respective ports.

In the absence of any oral agreement, the rights of the different parties, including the question of deviation, must necessarily be determined by the bills of lading.

Vide:

Western Lumber Mfg. Co. v. U. S., 9 Fed. (2d) 1004;

The West Aleta, 1925 A. M. C. 1427; 1926 A. M. C. 855;

The Sidonian, 34 Fed. 805; 35 Fed. 534;

Leduc & Co. v. Ward, 20 Q. B. D. 475. [82]

Clearly the bills of lading involved in the instant matters endow the vessel with a liberty to call at ports in geographical rotation as did the "HINDANGER".

The voyage to Buenos Aires was a long one and was, under the "liberty to call" privileges, completed within a reasonable time. No negligent delay has been shown.

Stopping and discharging cargo at the different ports (in geographical rotation) between San Francisco and Buenos Aires was not a deviation; and the time consumed on said journey was not a deviation.

Vide the following cases:

Rosenberg Bros. v. U. S. S. B. E. F. C., (Facts idem West Aleta, supra), 7 Fed. (2d) 893;

The Panola, 1925 A. M. C. 1173;

U. S. S. B. v. Florida Grain and Elevator Co., 20 Fed. (2d) 583;

South Atlantic S. S. Line v. London-Savannah Naval Stores, 255 Fed. 306;

Austrian Union S. S. Co. v. Calafiore, 194 Fed. 377.

The libels should, therefore, be dismissed and respondents awarded costs of action.

Dated: October 13th, 1932.

ERNEST E. WILLIAMS
Special Master

[Endorsed]: Filed Oct 13 1932 Walter B. Maling, Clerk. [83]

[Title of Court and Cause No. 20336-L]

LIBELANT'S EXCEPTIONS TO REPORT OF SPECIAL MASTER.

Comes now the libelant Poultry Producers of Central California and excepts to the report heretofore made to this Honorable Court by the Special Master appointed by the court herein, and for grounds of exception states:

1. That the Special Master erred in finding and holding that the rights of the parties herein must be

determined by the bill of lading issued at the time of receipt of the goods by respondents.

2. That the Special Master erred in finding that no contract of affreightment for the transportation of the goods in question was entered into between libelant and respondents.

3. That the Special Master erred in failing to find that the bill of lading issued upon receipt of said goods by respondents from libelant was issued solely as a receipt and in failing to find that said bill of lading did not constitute a contract of affreightment between the parties. [84]

4. That the Special Master erred in failing to find that on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Washington Cooperative Egg and Poultry Association, agreed to furnish, and respondents agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "HINDANGER", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco, April 2, 1930.

5. That the Special Master erred in failing to find that thereafter and on or about the 18th day of

March, 1930, respondents notified libelant that said vessel would be ready to load at San Francisco about April 4, 1930, and in failing to find that said subsequent notification definitely fixed the date upon which said M/S "HINDANGER" agreed to be ready to load at San Francisco.

6. That the Special Master erred in failing to find that said M/S "HINDANGER" was not ready to load at San Francisco on April 4, 1930, and in failing to find that said M/S "HINDANGER" did not arrive in San Francisco until April 8, 1930, at 8 P. M. and was not ready to load until April 9, 1930.

7. That the Special Master erred in finding that said 11,000 cases of eggs were loaded on board said M/S "HINDANGER" at San Francisco on or about April 7, 1930, and in failing to find that said 11,000 cases of eggs were loaded on board said vessel on April 9, 1930, and April 10, 1930. [85]

8. That the Special Master erred in failing to find that respondents breached said oral contract in the following respects:

(a) That said M/S "HINDANGER" did not sail about April 2, 1930, from San Francisco, but sailed April 10, 1930, from San Francisco.

(b) That said M/S "HINDANGER" was not ready to load at San Francisco on April 4, 1930, and was not ready to load until April 9, 1930.

(c) That said voyage was not of a duration of 35 days from San Francisco to Buenos Aires, as agreed, but said voyage was of a duration of 49 days from San Francisco to Buenos Aires.

(d) That said vessel called at the ports of Per-

nambuco and Bahia, both in Brazil, contrary to said agreement.

(e) That said vessel remained at the port of Montevideo for eight days instead of one day as agreed.

9. That the Special Master erred in failing to find that the M S "HINDANGER" deviated from the agreed voyage in the same respects as respondents breached said oral contract as set out in paragraph 8 hereof.

10. That the Special Master erred in failing to find that respondents Westfal-Larsen & Co. andM S "HINDANGER" are liable to libelant for all damages caused libelant by reason of the aforesaid breaches of contract, and deviations.

11. That the Special Master erred in holding that the libel should be dismissed and respondents awarded costs of action.

12. That the Special Master erred in failing to award libelant its costs of action.

Dated: October 18, 1932.

MILTON D. SAPIRO
CARL R. SCHULZ
Proctors for Libelant. [86]

[Endorsed]: Receipt of copy of the within is hereby admitted this 19th day of October, 1932.

LILLICK, OLSON & GRAHAM
Proctors for Respondents.

Filed Oct 19 1932. Walter B. Maling, Clerk. [87]

[Title of Court and Cause No. 20337-L.]

LIBELANT'S EXCEPTIONS TO REPORT OF SPECIAL MASTER.

Comes now the libelant Washington Cooperative Egg and Poultry Association and excepts to the report heretofore made to this Honorable Court by the Special Master appointed by the court herein, and for grounds of exception states:

1. That the Special Master erred in finding and holding that the rights of the parties herein must be determined by the bill of lading issued at the time of receipt of the goods by respondents.

2. That the Special Master erred in finding that no contract of affreightment for the transportation of the goods in question was entered into between libelant and respondents.

3. That the Special Master erred in failing to find that the bill of lading issued upon receipt of said goods by respondents from libelant was issued solely as a receipt and in failing to find that said bill of lading did not constitute a contract of affreightment between the parties.

4. That the Special Master erred in failing to find that [88] on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Poultry Producers of Central California, agreed to furnish, and respondents agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "HINDANGER", for

shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco, April 2, 1930.

5. That the Special Master erred in failing to find that thereafter and on or about the 18th day of March, 1930, respondents notified libelant that said vessel would be ready to load at Seattle about March 24, 1930, and in failing to find that said subsequent notification definitely fixed the date upon which said M/S "HINDANGER" agreed to be ready to load at Seattle.

6. That the Special Master erred in failing to find that said M/S "HINDANGER" was not ready to load on March 24, 1930, and in failing to find that said M/S "HINDANGER" did not arrive in Seattle until March 27, 1930, and was not ready to load until after such arrival.

7. That the Special Master erred in failing to find that respondents breached said oral contract in the following respects:

(a) That said M/S "HINDANGER" did not sail about March 20, 1930, from Seattle, but sailed March 28, 1930, from Seattle. [89]

(b) That said M/S "HINDANGER" was not ready to load at Seattle on March 24, 1930, and was not ready to load until after the arrival of the vessel on March 27, 1930.

(c) That said voyage was not of a duration of 48 days from Seattle to Buenos Aires, or 35 days from San Francisco to Buenos Aires, as agreed, but said voyage was of a duration of 62 days from Seattle and 49 days from San Francisco.

(d) That said vessel called at the ports of Pernambuco and Bahia, both in Brazil, contrary to said agreement.

(e) That said vessel remained at the port of Montevideo for eight days instead of one day as agreed.

8. That the Special Master erred in failing to find that M/S "HINDANGER" deviated from the agreed voyage in the same respects as respondents breached said oral contract, as set out in paragraph 7 hereof.

9. That the Special Master erred in failing to find that respondents Westfal-Larsen & Co. and M/S "HINDANGER" are liable to libelant for all damages caused libelant by reason of the aforesaid breaches of contract, and deviations.

10. That the Special Master erred in holding that the libel should be dismissed and respondents awarded costs of action.

11. That the Special Master erred in failing to award libelant its costs of action.

Dated: October 18, 1932.

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for Libelant. [90]

[Endorsed]: Receipt of copy of the within is hereby admitted this 19th day of October, 1932.

LILLICK, OLSON & GRAHAM,
Proctors for Respondents.

Filed Oct. 19, 1932. Walter B. Maling, Clerk. [91]

[Title of Court and Cause No. 20336-L.]

ORDER CONFIRMING REPORT OF COMMISSIONER.

After due consideration of the report of the Honorable Ernest E. Williams, United States Commissioner, dated October 13, 1932, and being fully informed in the premises, and good cause appearing therefor, the said report is hereby confirmed, and IT IS HEREBY ORDERED that a decree be entered dismissing the libel herein with costs to be awarded to the respondents.

Dated this 22 day of March, 1933.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Mar. 22, 1933. Walter B. Maling, Clerk. By Harry L. Fouts, Deputy Clerk. [92]

[Title of Court and Cause No. 20337-L.]

ORDER CONFIRMING REPORT OF COMMISSIONER.

After due consideration of the report of the Honorable Ernest E. Williams, United States Commis-

sioner, dated October 13, 1932, and being fully informed in the premises, and good cause appearing therefor, the said report is hereby confirmed, and IT IS HEREBY ORDERED that a decree be entered dismissing the libel herein with costs to be awarded to the respondents.

Dated this 22 day of March, 1933.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Mar. 24, 1933. Walter B. Maling, Clerk. [93]

[Title of Court and Cause No. 20336-L.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause having come on regularly for trial and hearing before the above entitled court, and the parties, by stipulation, having agreed to a submission of the matters under consideration therein, and the above entitled court having made its order referring the said cause to the Honorable Ernest E. Williams, United States Commissioner, for hearing, determination and report, and the hearing being had, and testimony, oral and documentary, having been offered before the Honorable Ernest E. Williams, United States Commissioner, on the 6th day of May, 1932, and thereafter on the 20th day of May, 1932, and thereafter concluded on the 26th day of May, 1932, Messrs. Lillick, Olson and Graham and Chalmers G. Graham appearing

for respondents, M. D. Sapiro and C. R. Schulz appearing for libelant, and the matter having been submitted to the said Commissioner for decision upon [94] the said testimony and exhibits presented before him and depositions of witnesses not present in court, and the court having heard the testimony of the witnesses for the libelant, R. S. Wintemute, B. F. McKibben, James E. Rother, John Lawler, and the witnesses for the respondents, R. S. Wintemute, Ralph V. Dewey, Ralph Bybee, Charles Reali, and the depositions of witnesses for the respondents, Jens Hansen and Amund Utne, having been introduced, and the said Commissioner having considered the facts and argument of counsel, oral and documentary, and having rendered his report that the libel herein should be dismissed and respondents awarded costs of action, and the court herein being fully informed in the premises, does now make the following

FINDINGS OF FACT:

1. That on or about the 7th day of April, 1930, Poultry Producers of Central California, a corporation, shipped at the port of San Francisco, California, on board the motorship "HINDANGER," owned and operated by the respondent Westfal-Larsen & Co., 11,000 cases of eggs for transportation to Buenos Aires, Argentine.

2. The motorship "HINDANGER" sailed from San Francisco on or about the 10th day of April, 1930, and arrived in Buenos Aires on the 29th day of May, 1930.

3. The contract of carriage for the transportation of the shipment of eggs made on board the "HINDANGER" by the libelant was evidenced by a written bill of lading issued to the libelant by the respondent Westfal-Larsen & Co., and this bill of lading contained all of the terms of the contract for the transportation of the shipment of eggs.

4. That for a period of some months prior to the aforesaid shipment, representatives of the libelant and respondents and/or their respective agents conferred in preliminary negotia- [95] tions regarding space, rates, sailing times, vessels, and other sundry matters concerning the general question of the shipment of eggs from the Pacific Coast of North America to the Atlantic Coast of South America, and particularly to Buenos Aires; that none of these preliminary negotiations resulted in the consummation of any contract between the libelant and respondents other than that evidenced by the bill of lading covering the transportation of the goods shipped.

5. The "HINDANGER" is a motorship engaged in the transportation of general cargo from ports on the Pacific Coast of North America to ports on the Atlantic Coast of South America, and is one of a fleet of vessels customarily calling and stopping at various ports on both continents for the purpose of loading and discharging cargo. The bill of lading covering the shipment of the cargo in question permitted a wide latitude in the privilege of calling at ports for the purposes of the voyage.

6. The ports at which the vessel stopped en

route to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading.

7. The "HINDANGER" arrived at Buenos Aires May 29, 1930; the voyage was reasonably within the time occupied by that vessel and others engaged in the same or a similar trade.

8. The sole grounds for recovery on behalf of the libelant are an alleged delay and deviation.

9. By stipulation of the parties, the libel against General Steamship Corporation, respondent, was dismissed during the hearing of the issues.

10. All of the witnesses for both libelant and respondents appeared in person and testified before the Commissioner with the exception of the master and chief officer of the motorship [96] "HINDANGER", whose testimony was presented by deposition.

From the foregoing findings of fact, the court states these

CONCLUSIONS OF LAW:

1. There was no oral contract entered into between the parties; preliminary conferences and meetings in which various phases of the transportation of eggs were discussed never resulted in a definite meeting of the minds, and no oral contract was consummated between libelant and respondents.

2. In the absence of binding oral agreements between the parties, their rights, including the question of deviation and delay, must necessarily be

determined by the bill of lading covering the shipment in question.

3. The bill of lading involved in the instant matter endows the vessel with a liberty to call at ports in the manner and order accomplished by the "HINDANGER".

4. The voyage between the port of loading and Buenos Aires, Argentine, was long and was, under the privileges permitted in the bill of lading, completed within a reasonable time; no negligent delay was established.

5. No deviation has been shown on the voyage undertaken, the time consumed thereby, or the ports at which the vessel called en route to Buenos Aires.

6. The libel should be dismissed, and the respondents should have their costs of suit herein.

Let judgment be entered accordingly.

Dated this 22nd day of October, 1932.

HAROLD LOUDERBACK,
United States District Judge. [97]

[Endorsed]: Service and receipt of a copy of the within is hereby admitted this 14th day of October, 1932.

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for Libelant.

Filed Mar. 24, 1933. Walter B. Maling, Clerk. [98]

[Title of Court and Cause No. 20337-L.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause having come on regularly for trial and hearing before the above entitled court, and the parties, by stipulation, having agreed to a submission of the matters under consideration therein, and the above entitled court having made its order referring the said cause to the Honorable Ernest E. Williams, United States Commissioner, for hearing, determination and report, and the hearing being had, and testimony, oral and documentary, having been offered before the Honorable Ernest E. Williams, United States Commissioner, on the 6th day of May, 1932, and thereafter on the 20th day of May, 1932, and thereafter concluded on the 26th day of May, 1932, Messrs. Lillick, Olson and Graham and Chalmers G. Graham appearing for respondents, M. D. Sapiro and C. R. Schulz appearing for libelant, and the matter having been submitted to the said Commissioner for decision upon [99] the said testimony and exhibits presented before him and depositions of witnesses not present in court, and the court having heard the testimony of the witnesses for the libelant, R. S. Wintemute, B. F. McKibben, James E. Rother, John Lawler, and the witnesses for the respondents, R. S. Wintemute, Ralph V. Dewey, Ralph Bybee, Charles Reali, and the depositions of witnesses for the respondents, Jens Hansen and Amund Utne, having been introduced, and the said Commissioner having con-

sidered the facts and argument of counsel, oral and documentary, and having rendered his report that the libel herein should be dismissed and respondents awarded costs of action, and the court herein being fully informed in the premises, does now make the following

FINDINGS OF FACT:

1. That on or about the 28th day of March, 1930, Washington Cooperative Egg and Poultry Association, a corporation, shipped at the port of Seattle, Washington, on board the motorship "HINDANGER", owned and operated by the respondent, Westfal-Larsen & Co., 4,000 cases of eggs for transportation to Buenos Aires, Argentine.

2. The motorship "HINDANGER" sailed from San Francisco on or about the 10th day of April, 1930, and arrived in Buenos Aires on the 29th day of May, 1930.

3. The contract of carriage for the transportation of the shipment of eggs made on board the "HINDANGER" by the libelant was evidenced by a written bill of lading issued to the libelant by the respondent Westfal-Larsen & Co., and this bill of lading contained all of the terms of the contract for the transportation of the shipment of eggs.

4. That for a period of some months prior to the aforesaid shipment, representatives of the libelant and respondents [100] and/or their respective agents conferred in preliminary negotiations regarding space, rates, sailing times, vessels, and other sundry matters concerning the general question of

the shipment of eggs from the Pacific Coast of North America to the Atlantic Coast of South America, and particularly to Buenos Aires; that none of these preliminary negotiations resulted in the consummation of any contract between the libelant and respondents other than that evidenced by the bill of lading covering the transportation of the goods shipped.

5. The "HINDANGER" is a motorship engaged in the transportation of general cargo from ports on the Pacific Coast of North America to ports on the Atlantic Coast of South America, and is one of a fleet of vessels customarily calling and stopping at various ports on both continents for the purpose of loading and discharging cargo. The bill of lading covering the shipment of the cargo in question permitted a wide latitude in the privilege of calling at ports for the purposes of the voyage.

6. The ports at which the vessel stopped en route to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading.

7. The "HINDANGER" arrived at Buenos Aires May 29, 1930. The voyage was reasonably within the time occupied by that vessel and others engaged in the same or a similar trade.

8. The sole grounds for recovery on behalf of the libelant are an alleged delay and deviation.

9. By stipulation of the parties, the libel against General Steamship Corporation, respondent, was dismissed during the hearing of the issues.

10. All of the witnesses for both libelant and respondents appeared in person and testified before the Commissioner with [101] the exception of the master and chief officer of the motorship "HINDANGER", whose testimony was presented by deposition.

From the foregoing findings of fact, the court states these

CONCLUSIONS OF LAW:

1. There was no oral contract entered into between the parties; preliminary conferences and meetings in which various phases of the transportation of eggs were discussed never resulted in a definite meeting of the minds, and no oral contract was consummated between libelant and respondents.

2. In the absence of binding oral agreements between the parties, their rights, including the question of deviation and delay, must necessarily be determined by the bill of lading covering the shipment in question.

3. The bill of lading involved in the instant matter endows the vessel with a liberty to call at ports in the manner and order accomplished by the "HINDANGER".

4. The voyage between the port of loading and Buenos Aires, Argentine, was long and was, under the privileges permitted in the bill of lading, competed within a reasonable time; no negligent delay was established.

5. No deviation has been shown on the voyage undertaken, the time consumed thereby, or the

ports at which the vessel called en route to Buenos Aires.

6. The libel should be dismissed, and the respondents should have their costs of suit herein.

Let judgment be entered accordingly.

Dated this 22nd day of March, 1932.

HAROLD LOUDERBACK,
United States District Judge. [102]

[Endorsed]: Service and receipt of a copy of the within is hereby admitted this 14th day of October, 1932.

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for Libelant.

Filed Mar. 24, 1933. Walter B. Maling, Clerk. [103]

[Title of Court and Cause No. 20336-L.]

LIBELANT'S PROPOSED EXCEPTIONS TO AND ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY RESPONDENTS.

FINDINGS OF FACT.

Libelant excepts to finding No. 1 and asks that it be amended by eliminating the words "on or about the 7th day of April, 1930," and substituting therefor the words "on April 9, 1930, and April 10, 1930".

Libelant excepts to finding of fact No. 3 and asks

that it be eliminated from the findings of fact made by the court.

Libelant excepts to finding of fact No. 4 and asks that it be eliminated from the findings of fact made by the court.

Libelant excepts to that portion of finding No. 5 reading:

> "The bill of lading covering the shipment of the cargo in question permitted a wide latitude in the privilege of calling at ports for the purposes of the voyage." [104]

Libelant excepts to finding of fact No. 6 and asks that it be eliminated from the findings of fact made by the court.

Libelant excepts to that portion of finding No. 7 reading:

> "The voyage was reasonably within the time occupied by that vessel and others engaged in the same or a similar trade."

Libelant excepts to finding of fact No. 8 and asks that it be eliminated from the findings of fact made by the court.

Libelant proposes the following additional findings of fact:

1. That the bill of lading issued upon receipt of goods involved herein was issued by respondents and received by libelant solely as a receipt and did not constitute a contract of affreightment between the parties.

2. That on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Washington Cooperative Egg and Poultry Association, agreed to furnish, and respondents agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "HINDANGER", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70c) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco, April 2, 1930. [105]

3. That thereafter and on or about the 18th day of March, 1930, respondents notified libelant that said vessel would be ready to load at San Francisco about April 4, 1930, and that said subsequent notification definitely fixed the date upon which said M/S "HINDANGER" agreed to be ready to load at San Francisco.

4. That said M/S "HINDANGER" was not ready to load at San Francisco on April 4, 1930, and said M/S "HINDANGER" did not arrive in San Francisco until April 8, 1930, at 8 p. m. and was not ready to load until April 9, 1930.

5. That said 11,000 cases of eggs were not loaded on board said M/S "HINDANGER" at San Francisco on or about April 7, 1930, but said 11,000 cases

of eggs were loaded on board said vessel on April 9, 1930, and April 10, 1930.

6. That respondents breached said oral contract in the following respects:

(a) That said M/S "HINDANGER" did not sail about April 2, 1930, from San Francisco, but sailed April 10, 1930, from San Francisco.

(b) That said M/S "HINDANGER" was not ready to load at San Francisco on April 4, 1930, and was not ready to load until April 9, 1930.

(c) That said voyage was not of a duration of 35 days from San Francisco to Buenos Aires, as agreed, but said voyage was of a duration of 49 days from San Francisco to Buenos Aires.

(d) That said vessel called at the ports of Pernambuco and Bahia, both in Brazil, contrary to said agreement.

(e) That said vessel remained at the port of Montevideo for eight days instead of one day as agreed.

7. That the M/S "HINDANGER" deviated from the agreed voyage in the same respects as respondents breached said oral [106] contract as set out in paragraph 6 hereof.

CONCLUSIONS OF LAW:

Libelant excepts to respondents' proposed conclusions of law numbers one to six, inclusive, and to each of them and asks that each of them be eliminated from the conclusions of law made by the court herein.

Libelant proposes the following conclusions of law:

1. That the shipment here involved was transported pursuant to an oral contract of affreightment between respondents and libelant.

2. That respondents breached said oral contract of affreightment and are liable to libelant for all damages caused by reason of the failure of respondents to transport said goods to reach Buenos Aires on or before May 1, 1930.

3. That the M/S "HINDANGER" deviated from the agreed voyage and respondents are liable to libelant for all damages caused libelant by reason thereof.

4. That libelant is entitled to its costs of suit herein.

Dated: October 18, 1932.

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for Libelant.

[Endorsed]: Receipt of copy of the within is hereby admitted this 19th day of October, 1932.

LILLICK, OLSON & GRAHAM,
Proctors for Respondents.

Filed Oct. 19, 1932. Walter B. Maling, Clerk. [107]

[Title of Court and Cause No. 20337-L.]

LIBELANT'S PROPOSED EXCEPTIONS TO AND ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY RESPONDENTS.

FINDINGS OF FACT.

Libelant excepts to finding of fact No. 3 and asks that it be eliminated from the findings of fact made by the court.

Libelant excepts to finding of fact No. 4 and asks that it be eliminated from the findings of fact made by the court.

Libelant excepts to that portion of finding No. 5 reading:

> "The bill of lading covering the shipment of the cargo in question permitted a wide latitude in the privilege of calling at ports for the purposes of the voyage."

Libelant excepts to finding of fact No. 6 and asks that it be eliminated from the findings of fact made by the court.

Libelant excepts to that portion of finding No. 7 reading: [108]

> "The voyage was reasonably within the time occupied by that vessel and others engaged in the same or a similar trade."

Libelant excepts to finding of fact No. 8 and asks that it be eliminated from the findings of fact made by the court.

Libelant proposes the following additional findings of fact:

1. That the bill of lading issued upon receipt of the goods involved herein was issued by respondents and received by libelant solely as a receipt and did not constitute a contract of affreightment between the parties.

2. That on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Poultry Producers of Central California, agreed to furnish, and respondents agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "HINDANGER", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70c) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco, April 2, 1930.

3. That thereafter and on or about the 18th day of March, 1930, respondents notified libelant that said vessel would be ready to load at Seattle about March 24, 1930, and that said subsequent notification definitely fixed the date upon which said M/S "HINDANGER" agreed to be ready to load at Seattle. [109]

4. That said M/S "HINDANGER" was not ready to load on March 24, 1930, and that said M/S "HINDANGER" did not arrive in Seattle

until March 27, 1930, and was not ready to load until after such arrival.

5. That respondents breached said oral contract in the following respects:

(a) That said M/S "HINDANGER" did not sail about March 20, 1930, from Seattle, but sailed March 28, 1930, from Seattle.

(b) That said M/S "HINDANGER" was not ready to load at Seattle on March 24, 1930, and was not ready to load until after the arrival of the vessel on March 27, 1930.

(c) That said voyage was not of a duration of 48 days from Seattle to Buenos Aires, or 35 days from San Francisco to Buenos Aires, as agreed, but said voyage was of a duration of 62 days from Seattle and 49 days from San Francisco.

(d) That said vessel called at the ports of Pernambuco and Bahia, both in Brazil, contrary to said agreement.

(e) That said vessel remained at the port of Montevideo for eight days instead of one day as agreed.

6. That the M/S "HINDANGER" deviated from the agreed voyage in the same respects as respondents breached said oral contract as set out in paragraph 5 hereof.

CONCLUSIONS OF LAW.

Libelant excepts to respondent's proposed conclusions of law numbers one to six, inclusive, and to each of them, and asks that each of them be

eliminated from the conclusions of law made by the court herein.

Libelant proposes the following conclusions of law:

1. That the shipment here involved was transported pur- [110] suant to an oral contract of affreightment between respondents and libelant.

2. That respondents breached said oral contract of affreightment and are liable to libelant for all damages caused by reason of the failure of respondents to transport said goods to reach Buenos Aires on or before May 1, 1930.

3. That the M/S "HINDANGER" deviated from the agreed voyage and respondents are liable to libelant for all damages caused libelant by reason thereof.

4. That libelant is entitled to its costs of suit herein.

Dated: October 18, 1932.

MILTON D. SAPIRO,
CARL R. SCHULZ,
Proctors for Libelant.

[Endorsed]: Receipt of copy of the within is hereby admitted this 19th day of October, 1932.

LILLICK, OLSON & GRAHAM,
Proctors for Respondents.

Filed Oct. 19, 1932. Walter B. Maling, Clerk. [111]

In the Southern Division of the United States District Court in and for the Northern District of California. First Division. In Admiralty.

No. 20336-L.

POULTRY PRODUCERS OF CENTRAL CALIFORNIA, a corporation.

Libelant.

vs.

Motorship "HINDANGER", her engines, boilers, tackle, etc., WESTFAL-LARSEN & CO., a corporation; GENERAL STEAMSHIP CORPORATION, a corporation.

Respondents.

FINAL DECREE.

The above entitled cause having come on regularly for trial and hearing before the Honorable Ernest E. Williams, United States Commissioner, and the said United States Commissioner having rendered his report and findings to the above entitled court, and the same having been confirmed, and the above entitled court having made its findings of fact and conclusions of law, finding that none of the respondents herein are liable to the libelant herein, and directing that a decree be entered herein,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the

respondents are hereby declared to be without fault in the premises, and the libel of the libelant, Poultry Producers of Central California, a corporation, is hereby dismissed, with costs to the respondents, and with prejudice to the institution of any further proceedings based upon the cause of action set [112] forth in the libel herein.

Done in open court this 22nd day of March, 1933.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Mar. 22, 1933. Walter B. Maling, Clerk. By Harry L. Fouts, Deputy Clerk.

Entered in Vol. 28 Judg. and Decrees at page 338.

Rec. in Court Nov. 28, 1932. [113]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division. In Admiralty.

No. 21271-L.

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION, a corporation, Libelant,

vs.

Motorship "HINDANGER", her engines, tackle, etc., WESTFAL-LARSEN & CO., a corporation; GENERAL STEAMSHIP CORPORATION, a corporation,

Respondents.

FINAL DECREE.

The above entitled cause having come on regularly for trial and hearing before the Honorable James F. Williams, United States Commissioner, and the said United States Commissioner having rendered his report and findings in the above entitled cause, and the same having been confirmed, and the above entitled court having made its findings of fact and conclusions of law, finding that none of the respondents herein are liable to the libelant herein, and directing that a decree be entered herein,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the respondents are hereby declared to be without fault in the premises, and the libel of the libelant, Wash-

ington Cooperative Egg and Poultry Association, a corporation, is hereby dismissed, with costs to the respondents, and with prejudice to the institution of any further proceedings based upon the cause of [114] action set forth in the libel herein.

Done in open court this 22nd day of March, 1932.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Mar. 24, 1933. Walter B. Maling, Clerk. Entered in Vol. 28 Judg. and Decrees at Page 343.

Rec. in Court Nov. 28, 1932. [115]

DEPOSITIONS OF JENS HANSEN AND AMUND UTNE,

taken on behalf of Respondents, September 11, 1930, before Ernest E. Williams, U. S. Commissioner. [116]

JENS HANSEN

MR. LILLICK: Q. How old are you, Captain?

A. 49.

Q. How long have you been going to sea?

A. Nearly thirty-one years.

Q. On what vessel are you now working?

A. On the "Hindanger."

Q. In what position? A. As master.

Q. How long have you been on the "Hindanger"?

A. Since she was new, in October of 1929. She was new a year ago.

Q. When did the "Hindanger" come into San

(Deposition of Jens Hansen.)

Francisco on its last trip? How long have you been in port?

A. We arrived here on the 5th.

Q. On the 5th of September?

A. On the 5th of September.

Q. And when are you leaving, Captain?

A. I expect to sail from here on Saturday the 13th.

Q. On a voyage to where?

A. To Rio de Janeiro. We call in at Los Angeles, first, and then Rio de Janeiro, Santos, Montevideo, and Buenos Aires.

Q. Where did you take the "Hindanger" over as master, where was she when you went on her as master? A. Newcastle, England.

Q. Were you her first master?

A. I was her first master.

Q. And have been ever since?

A. And I have been ever since.

Q. How large a vessel is she?

A. In dead weight, she is 8500 tons, about.

Q. About how long is she, what are her dimensions? A. 415 feet long, from end to end.

Q. What is her breadth of beam? A. 55½.

Q. How is she equipped for cargo-carrying?

A. She is equipped, as we call it, as a general cargo boat.

Q. How did she differ from a general cargo boat with reference to her ability to carry perishable cargo?

A. My opinion is that when a boat is fitted with

(Deposition of Jens Hansen.)

'tween decks and several compartments 'tween decks, I call that a cargo boat. A bulk boat [117] for such things as coal, or iron, or such things, they generally have an open hold without 'tween decks. That is my experience.

Q. I was speaking more particularly, Captain, with reference to any difference there might be in her construction, in order to enable her to carry perishable cargo, as distinguished from a general cargo-carrying vessel, with no such equipment?

A. There is not any difference in construction, but there can be in equipment, fitting her out.

Mr. LILLICK: You, gentlemen, will admit, I assume, that she had a cold chamber. That is all I wanted.

Mr. SCHULZ: Yes.

Mr. LILLICK: Q. There is that difference in her equipment, is there not, Captain, distinguishing her from a general cargo-carrying vessel? A. Yes.

Q. What are the usual cargoes that you carry in this trade? A. Lumber and general cargo.

Q. By "general cargo," what do you mean?

A. I mean, for instance, dried fruit, and other things in bags and cases, and such things; besides that, we have the freezing cargo.

Q. Prior to your having taken the "Hindanger" out on her first voyage, what experience had you in the trade between the West Coast of North America and the East Coast of South America?

A. I don't know just what you mean.

Q. Captain, before you went on the "Hindan-

(Deposition of Jens Hansen.)

ger," what vessels, if any, were you on that operated in the trade of the Westfal-Larsen Line between the West Coast of North America and the East Coast of South America? A. The "Leikanger."

Q. Is that the only one?

A. When they opened the line I had the "Breire," and then I left her.

Q. When did the Westfal-Larsen line open its steamship line [118] operating in that trade?

A. In March, 1926.

Q. And you started with the line at that time?

A. Yes.

Q. Have you been operating in it ever since, Captain?

A. I have been operating in it ever since.

Q. How many voyages has the "Hindanger" made? A. I am now on my third voyage.

Q. You remember the voyage upon which you carried eggs between Seattle, Portland, San Francisco, and the East Coast of South America?

A. Yes, Voyage No. 2.

Q. Prior to that, then, the "Hindanger" had made one other voyage? A. Yes.

Q. On that other voyage, Captain, where did the "Hindanger" start from the West Coast of North America? A. On the first voyage?

Q. Yes, on the first voyage. A. From Everett.

Q. Can you give us the names of the ports at which the "Hindanger" stopped on that voyage?

A. We started at Everett; then Vancouver, then Port Angeles, then Grays Harbor; then Portland,

(Deposition of Jens Hansen.)

then San Francisco, then Los Angeles, then the Panama Canal, and Rio Janeiro, Santos, Montevideo, Buenos Aires.

Q. What are the regular ports of call at which the Westfal-Larsen Line vessels, including the "Hindanger," stop between Everett and Buenos Aires? A. Those are the regular ports.

Q. Are there any other ports in that regular run besides the ones you have mentioned, at which the "Hindanger" stopped on Voyage No. 1?

A. No, she did not stop at any other port.

Q. Perhaps you do not understand my question, Captain. You have named the ports at which the "Hindanger," on the first voyage, had stopped; are there other ports on that voyage at which the vessels of the Westfal-Larsen stop in making the voyage? A. Oh, yes. [119]

Q. I ask you, then, Captain, to name from Everett Washington the ports of call at which the Westfal-Larsen Line vessels stopped in making voyages from Everett, Washington, to Buenos Aires?

A. If we have cargo we call into all the ports in Brazil; for instance, Pernambuco, and Bahia, if we have cargo for those ports.

Q. Can't you name those ports, Captain, starting from Everett? You say you have been in this trade since 1926. What I should like you to do is to give us the ports of call at which the Westfal-Larsen Line vessels stop in making their regular voyages between Everett, Washington, and Buenos, Aires.

(Deposition of Jens Hansen.)

A. I can mention every port I have been into on this boat. If any of the other ships on the line have been to other ports, I don't know.

Q. What you have done is what I want, Captain.

A. From Everett to Buenos Aires, I just mentioned the ports I have been into on Voyage No. 1. On Voyage No. 2 I can give you the ports at which I called; now, we start at Vancouver—I think I will have to refer to my log, because it is hard to remember all those places.

Q. All right, do so.

A. We started at Vancouver; Seattle, Portland, Grays Harbor, San Francisco, Los Angeles, via the Canal to Pernambuco, Bahia, Rio de Janeiro, Santos, Montevideo, and Buenos Aires. On Voyage No. 2 those are the ports I called at.

Q. On voyages on any other vessels that you have operated in that line, have you stopped at any other ports in the trade?

A. Yes. When we went through the Straits of Magellan, for instance, with the "Breiredanger," we called into La Blanca, Argentina, Montevideo, and Buenos Aires.

Q. Captain, speaking of your voyage No. 2, alone, can you tell me when the "Hindanger" left Seattle? [120]

A. That was on March 28, I think.

Q. I think you had better refer to your log-book, unless you are certain about the date, Captain.

A. March 28th we left Seattle.

Q. On that voyage, Captain, give us the ports of call at which the "Hindanger" stopped, and in

(Deposition of Jens Hansen.)

your answer state when the "Hindanger" left each port.

A. The next port would be Portland. We left Portland the 2nd of April. From Portland we proceeded to Grays Harbor and left Grays Harbor on April 6th. From Grays Harbor we proceeded to San Francisco, and left San Francisco on April 10th. From San Francisco we proceeded to San Pedro, and left San Pedro April 13th. From San Pedro we proceeded via the Canal to Pernambuco, and left Pernambuco May 8th. From Pernambuco we proceeded to Bahia, and left Bahia May 12th. From Bahia we proceeded to Rio de Janeiro, and left Rio de Janeiro May 16. From Rio de Janeiro we proceeded to Santos, and left Santos May 17. From Santos we went to Montevideo, and left Montevideo May 28th. From Montevideo we went to Buenos Aires, arriving on May 29th.

Q. At those various ports, Captain, have you any recollection, in a general way, what cargo was discharged at those various ports? Give us your best recollection of it? I don't expect you to be accurate, but what was the character of the cargo you discharged?

A. There was kerosene, and gasoline, and general cargo, and lumber.

Q. Was or was not that the usual character of the cargoes carried by the vessels of this line to those ports?

A. That was the usual cargo, yes. And, besides that, we had eggs on board for Buenos Aires.

(Deposition of Jens Hansen.)

Q. On this trip, Voyage No. 2, captain, what was the character of the weather?

A. We had fine weather and we had a little bit. I [121] won't say rough, but we had weather that delayed the ship, a little bit heavy.

Q. What effect did that have upon the speed of the "Hindanger"?

A. It would take the speed down.

Q. How much?

A. Just according to the weather. That weather took the speed down from one and a half to two miles an hour, for several days.

Q. For how many days, Captain?

A. Now, I will have to go through the log again. On April 26th the speed was down for one day; and April 27; and April 28——

Q. Captain, I want you to be exact about that. In examining your log, when you say "about a day," don't have it over the time. I want it just as nearly exact as you can give it.

A. I have everything here in the log-book, and I have to go by the log-book. On April 29 we had it; on the 30th, was one of the worst days. May 1st, 2nd.

Q. How many days is that altogether?

A. That will be six days—seven days.

Q. Is it six or seven?

A. Seven days. May 2nd was not so bad as the other days, but still it was a little bad.

Q. What is the average speed of the "Hindan-

(Deposition of Jens Hansen.)

ger'' at sea with the type of cargo that she had on board on Voyage No. 2?

A. Do you mean for the whole trip?

Q. I mean her average speed. I don't mean on voyage No. 2. I mean assuming the average voyage, and your speed at sea, what does the ''Hindanger'' make with a cargo of that character?

A. In good weather, it will be around about twelve or twelve and a half knots.

Q. And how much was she retarded by the six or seven days of heavy weather?

A. From one and one-half to two and one-quarter miles per hour. [122]

Q. In putting into Pernambuco on Voyage No. 2, did you have any unusual delay at that port?

A. I came into Pernambuco at night, anchored in the road at night, and I was held up the next morning for a pilot, and an examination by the doctor. When the pilot took me into the harbor, there, again, I was tied up in the harbor waiting for a berth, in order to get alongside the dock. In the afternoon we came alongside. I commenced discharging at night on overtime.

Q. When did the discharging commence at Pernambuco?

A. I think it was seven o'clock that night; yes, seven p. m.

Q. When did you arrive at Pernambuco, at what time?

A. We anchored outside Pernambuco, in the road, on the 5th of May, at 11:40 p. m.

(Deposition of Jens Hansen.)

Q. Why did you anchor in the road?

A. Waiting for a pilot, and daylight.

Q. When did the pilot come on board?

A. He came on board at 7:30 a. m.

Q. Of what day? A. May 6th.

Q. Then where did the "Hindanger" go?

A. Just one moment, please; we anchored on May 6th and the pilot came on board on May 7th.

Q. Then where did you go after you came in from the road? A. We went into the inner harbor.

Q. What did you do there, did you go alongside a berth, or did you anchor?

A. We anchored in the harbor, waiting for a berth alongside the dock.

Q. Why did you have to await a berth?

A. There was another boat, I think, coming in there, using that berth. I don't know the reason. They said they expected another boat in there, and that boat had to dispatch first before we could come in. That boat came in all right and went out again, and when she [123] was finished we came alongside.

Q. What is the custom at Pernambuco as to waiting for berths? Do the ships take their regular course, one after the other, in proceeding to a berth as they come in the harbor, or what is it?

A. I cannot say that. So far as I understand, passenger liners and post boats come to the dock first.

Q. Who regulates that or orders it?

A. It must be the captain of the port, I think.

Q. When did you get to your berth, Captain, in Pernambuco?

(Deposition of Jens Hansen.)

A. I was moored alongside the dock at 3:30 p. m. on May 7.

Q. When did you commence discharging?

A. At 7 p. m. on the same day.

Q. And how long did you continue discharging?

A. We were discharged at 12:30 midnight; that would be on the 8th, half past twelve midnight.

Q. Did you or did you not work overtime?

A. We worked overtime.

Q. At whose expense was that overtime?

A. That was at the ship's expense.

Q. Why did you work overtime, Captain?

A. Because we like to have as quick a dispatch as possible. That is my business, to make it as quick as possible before coming back up here.

Q. When did you arrive at Bahia? A. May 10.

Q. At what time? A. 6:15 a. m.

Q. Is that your time of arrival?

A. That was in the inner harbor. We anchored outside on May 9th at 8:15 p. m. The next morning we came into the inner road at 5:30.

Q. When did the harbor authorities come on board?

A. They came on board at 6:30 a. m. on May 10.

Q. What happens when the harbor authorities come on board? Why is it necessary?

A. They go through the papers, usually, and [124] pass it, practically, and give me a paper to go ahead and discharge.

Q. What was the condition of the weather at that time? A. There was a heavy swell in there.

(Deposition of Jens Hansen.)

Q. What occurred with reference to the discharging? Did you commence discharging right away?

A. No.

Q. Why not?

A. The agents told me the swell was too heavy, so that the lighter could not come alongside the ship. The captain of the port refused to send the lighter out. He is the head man in making the discharge, I think.

Q. When did discharging commence, Captain?

A. It commenced May 11, at 8 p. m.

Q. What day was that?

A. That was Sunday, May 11.

Q. Did you or did you not discharge on overtime? A. Yes.

Q. When did you finish discharging?

A. We finished May 12, at 3 p. m.

Q. Then you went to Rio, did you, Captain?

A. Yes, then we went to Rio.

Q. Can you tell me whether you worked overtime in discharging at Rio?

A. Yes, we worked overtime in Rio, too.

Q. Then when you arrived at Santos, can you tell me whether you discharged on regular time, or on overtime? A. On regular and on overtime.

Q. You arrived at Montevideo when, at what time? A. We arrived there May 21 at 5:30 a. m.

Q. What did you do about discharging at Montevideo? A. We worked overtime there, too.

Q. Did you work at night? A. Yes.

(Deposition of Jens Hansen.)

Q. Did you discharge into lighters, or alongside the dock?

A. Both. We started with lighters outside in the outer harbor, or, rather, the outer road, outside the breakwaters; we started discharging the gasoline to lighters on overtime. [125]

Q. And when did you shift to a berth, if you did, Captain? A. To the dock, do you mean?

Q. Yes.

A. We came alongside the dock May 26th.

Q. As to your discharging, did you work overtime there, too?

A. Yes, we worked overtime there, too, lighter and dock.

Q. Lighter and dock?

A. No, not at the dock as to overtime; the overtime was on the lighters.

Q. Do I understand you discharged both at the dock and to lighters at the same time?

A. Yes, during the day, but only to lighters on overtime.

Q. Captain, was there anything that you could have done, as master of the ship, to have more quickly obtained dispatch or discharge any more rapidly than you did? A. Absolutely not.

Q. Captain, was there anything on this particular Voyage No. 2 that would distinguish it from any other voyage that you have had on any of the other vessels of the line?

A. No, not except calling into so many ports. I had so many ports on the voyage before, on the trip before.

(Deposition of Jens Hansen.)

Q. But those ports that you made, were they or were they not the regular ports of call of the line?

A. They are the regular ports of call.

Q. Captain, in your own opinion, was this voyage any slower than the usual voyage to Montevideo?

A. No.

Q. If you were to describe it as a usual or unusual voyage, as to time, what would you say?

A. Well, everything is dependent on how many ports we have to call into before we can say it is slow. On some trips we have, say, so many ports to go into, and then certainly we make the voyage quicker; then, on other trips there will be more ports to call into, and then it would be slower.

Q. Captain, on voyages prior to Voyage No. 1 on the "Hindanger," [126] in proceeding south how did you go—did you go through the Panama Canal?

A. Through the Panama Canal, yes.

Q. When did you first commence going through the Panama Canal?

A. With the "Hindanger," Voyage No. 1.

Q. And the "Hindanger's" Voyage No. 1 was the first voyage that the Westfal-Larsen Line made through the Canal: Is that right?

A. No, I don't think so; I think there was a ship ahead of her again.

Q. But Voyage No. 1 was your first voyage through the canal? A. That was my first.

Q. How did you get to Montevideo and Buenos Aires on your prior voyages, by what route? Was it through the Panama Canal?

(Deposition of Jens Hansen.)

A. Through the Straits of Magellan.

Q. And then what did you do, did you make the complete circuit of South America and come back through the canal? A. Yes.

Mr. LILLICK: You may take the witness.

Cross-Examination.

Mr. SCHULZ: Q. I am not certain as to when you stated that the Westfal-Larsen Line commenced operations. Will you state that again, when they commenced in the South American service?

A. In March, 1926.

Q. On how many previous voyages that you have taken had a call been made at Grays Harbor?

A. That would be difficult for me to say. I cannot remember. Do you mean on this boat, here?

Q. On this line. A. I cannot answer that question because I have been so many times into Grays Harbor. I cannot say how many times I have been there. It is impossible for me to go so many years back and say.

Q. How many trips have you taken between the North Pacific Coast and Argentina for the Westfal-Larsen Line?

A. That is also difficult for me to remember. I had the "Breierdanger" for [127] three years on that run. I don't remember how many trips I made with her.

Q. Was it customary for you to call in at Grays Harbor on these voyages?

A. Nearly every time, except one, or two, or three

(Deposition of Jens Hansen.)

times. If there is cargo in there it is customary to go in there.

Q. Is it customary to call at Grays Harbor after or before calling at Portland?

A. It depends on what port the cargo is for in South America. For instance, we are calling at Montevideo or Buenos Aires; if Portland has cargo for Buenos Aires and none for Montevideo, then we go up to Portland and pick up that cargo, and then go back to Grays Harbor, in case the cargo in Grays Harbor is for Montevideo.

Q. Did the "Hindanger" have cargo from Portland to Buenos Aires on this trip? A. Oh, yes, she had.

Mr. SCHULZ: At this time I would like to make demand for the logs of the prior voyages as to which Mr. Hansen has testified.

Mr. LILLICK: As to which vessel? It may be that we will have to send to Norway for them. Just give me a list of the ones you want.

Mr. SCHULZ: I think it would be satisfactory to get those since the Canal route was open.

Mr. LILLICK: That would not go very far, because the "Hindanger" No. 1 was his first voyage. Suppose you give me a list of the ships you want, and for what year. I don't know whether I can get them. If you specify the boats, I will see what I can do.

Mr. SCHULZ: I was just wondering how necessary it would be. I will withdraw the demand for those prior logs.

Q. On how many prior voyages, if any, for the

(Deposition of Jens Hansen.)

Westfal-Larsen Company, have you stopped at the port of Pernambuco? A. Only one. [128]

Q. One, in addition to Voyage No. 2?

A. Only one trip.

Q. And that was Voyage No. 2 of the "Hindanger"? A. Yes.

Q. Approximately how long, in your opinion, was the voyage held back by the call at Pernambuco?

A. It would be around about two days; about that.

Q. On how many prior voyages did you call into the port of Bahia for the Westfal-Larsen Line?

A. That was the only trip I was into Bahia.

Q. How long would you estimate a delay was occasioned by reason of that call?

A. I would call that around about two and one-half days.

Q. On how many prior voyages you made for the Westfal-Larsen Line did you handle gasoline for South American ports?

A. I cannot give you that exactly, but I think that was my third voyage on the Larsen Line where I handled gasoline; the third or fourth, I am not quite sure. I had it on the "Breierdanger," too, you know.

Q. Approximately how many days sailing time do you estimate you were retarded by this heavy weather that you say you encountered?

A. I think about a day and a half or two days. Two days, about. That is just rough.

Q. Could you, by reference to your log, tell just

(Deposition of Jens Hansen.)

how many miles you were held up during those days as against the normal speed that you make?

A. Yes, I can do that, but it will take a little time. I can't give it exactly, but it would be around about 420 miles.

Q. That does not seem to check up at all with your previous estimates as to your delay. Are you sure of those figures?

A. Yes. I have the speed, here, of the ship, and the distance we made, and what we should have made.

Mr. LILLICK: Mr. Schulz, you can ask Mr. Utne, the chief of- [129] ficer, who is here, about this if you so desire, and I think that he can explain it. I think he understands the English language better than the captain does, and can explain himself better.

Mr. SCHULZ: Very well.

Q. Mr. Utne, could you, by reference to the log, show just what delay was encountered by reason of the heavy weather to which Mr. Hansen testified?

A. You mean that the number of days he mentioned from the log-book do not account for those miles?

Q. Yes.

A. I guess the captain takes into consideration the current. We had a very strong current against us, too.

Q. That still does not explain, being held up one and a half to two miles an hour, for seven days, the 420 miles.

(Deposition of Jens Hansen.)

A. The one and one-half miles is the log; the observation distance is the 420.

Q. Was that current to be anticipated in that district?

A. That is the reason. We had a very strong current against us. The captain took the difference between the observation distance and the log.

Q. Was that current to be anticipated in that district? A. What do you mean?

Q. Could you expect that?

A. Oh, yes, you can expect it.

Q. Would it be possible for us to get accurately what delay was caused by the heavy weather?

Mr. LILLICK: Just as a suggestion, Mr. Schulz, two and a half miles an hour for twenty-four hours means 60 miles in twenty-four hours, and for seven days it would mean 420 miles.

A. It would be about 230 miles.

Mr. SCHULZ: I made it 236. So that is pretty close. That is all.

Mr. SCHULZ: Now I will resume with the Captain.

Q. Was that the only delay that you encountered, by reason of [130] bad weather on the voyage?

A. Bad weather, yes.

Q. Do you expect a delay of one day by reason of the weather as against your normal sailing time on a voyage of that extent?

A. We do not expect anything. We have fine weather, too, you know.

(Deposition of Jens Hansen.)

Q. Would it be unusual for you to expect a delay of one day on such a voyage?

A. I don't think you should expect anything.

Q. On previous voyages that you made, has it been customary to maintain the speed of twelve and a half miles for the entire voyage?

A. In fine weather, yes.

Q. But how about for the entire voyage, has it been customary that fine weather should continue for the entire voyage?

A. Well, I only made one trip before, and we had a little bit rough weather, too, then, you know, but not in the same place as we had it here.

Q. Did you meet as much delay on that previous voyage as you did here? A. I cannot answer that.

Q. Do you remember how many days of rough weather you had on that previous voyage? A. No.

Q. You testified, I believe, as to using every effort at Montevideo in unloading; could you have expedited unloading at any of the other ports by the use of reasonable care in unloading? Could you have speeded it up, could you have made it faster?

A. No, I could not make it faster than that.

Q. Did you know, when you left San Francisco, that it would take you approximately that long to unload at the different ports along the way?

A. There were ports I had never been into before. For instance, Pernambuco and Bahia, I had not been into those two ports before, so I did not know the situation there.

Q. How about at Montevideo?

(Deposition of Jens Hansen.)

A. Oh, yes, I know the situation [131] there. It is always slow work there.

Q. Did you know when you left San Francisco that the discharging of the cargo at Montevideo would take approximately the time that it did?

A. No. I didn't know the situation about gasoline—no, I had benzine. I had gasoline before down there, but never had benzine. I didn't know the situation about benzine, whether they would discharge it inside or outside the harbor. So that was something new to me.

Q. Didn't you know you would have to discharge that in lighters?

A. I knew I would have to discharge it into lighters. For benzine they discharge it outside the breakwater. For discharging gasoline they took me inside the breakwater. It seems to me they were more frightened about the benzine than the gasoline. That was the reason for it. That was something new for me.

Q. I didn't quite understand your testimony with regard to whether this voyage was longer than the usual one. Was this voyage longer than the first voyage of the "Hindanger"?

A. I think it was shorter. I think this voyage was shorter than the first one.

Q. Do you know how long the first voyage took?

A. I don't quite remember that, I think around about 50 days, and the other was 46, or 47, or something like that.

Q. Those are the only two voyages of which you

(Deposition of Jens Hansen.)

are familiar by that line via the Panama Canal?

A. Yes.

Q. Did you encounter any unusual causes to delay you on the first voyage of the "Hindanger"?

A. Yes, we had some engine trouble on the first voyage. We did not have any engine trouble on the second voyage.

Q. You had no engine trouble, at all, on the second voyage? A. No.

Q. How long a delay was caused by the engine trouble on the second voyage?

A. I cannot say that, exactly. One day we could [132] have one hour, and another day two hours, or three hours, or four hours. That was the ship's first trip, and you can always expect something like that.

Q. On the first voyage of the "Hindanger," how long was the stay at Montevideo?

A. I don't remember that.

Q. Can you look at your log and tell?

A. We stayed there twelve days at Montevideo the first trip.

Q. What was the reason for that long stay at Montevideo on the first trip, was it for discharging?

A. Discharging, yes.

Q. Was that the normal time for discharging the cargo that you had on that voyage for Montevideo?

A. Yes.

Q. Did you communicate with the owners of the vessel at any time as to the course that you should pursue on the second voyage of the "Hindanger" after leaving San Francisco?

(Deposition of Jens Hansen.)

A. No. I never had any such instructions from the owners.

Q. Did you have any instructions from the agent of the owner at Buenos Aires after arriving at Montevideo?

A. I don't know what you mean by that. When we come into a port, for instance, let us say, San Francisco, I hand the ship over to the agents and they are usually handling everything here—I mean for the cargo and that sort of thing.

Q. Did the agents at Buenos Aires suggest to you calling at Buenos Aires, or stopping at Montevideo?

A. No, I don't know anything about that.

Q. Did the agent at Montevideo suggest that to you?

A. No. I don't think I could do it there, I could not go to Buenos Aires or Montevideo, that is impossible, because I had gasoline and kerosene on board for Montevideo, and that had to get out before we went to Buenos Aires.

Q. Because of the way the vessel was loaded?

A. Yes.

Q. How was that gasoline carried; was it carried in tanks? [133] A. No, in cases.

Q. And that was loaded on top of the Buenos Aires cargo? A. Yes.

Q. Did the agent of the shippers at Buenos Aires communicate with you with regard to the delay at Montevideo? A. No.

Q. When you sailed from San Francisco, how long did you estimate that the voyage would take?

(Deposition of Jens Hansen.)

A. That just depends on how much cargo we have for the different ports.

Q. When you sailed from San Francisco you knew how much cargo you had?

A. Not from San Francisco, but from San Pedro we know it. You mean voyage No. 2, do you?

Q. Yes, voyage No. 2.

A. As I say, I had not been in Bahia and Pernambuco before; those two ports were new to me, and I didn't know the situation in there, how the dispatch of cargo would be in there.

Q. Eliminating delay at Pernambuco and Bahia, how long did you estimate the voyage would take from San Francisco to Buenos Aires, when you sailed?

A. Direct to Buenos Aires, and without calling in at any ports, do you mean?

A. I mean on this voyage, but disregarding the delay you would have in the port of Bahia and the port of Pernambuco.

A. My English is not good enough to understand that.

Q. You suggested you did not know how long it would take you to unload at Bahia and at Pernambuco. Now, I am asking you to disregard any stay at either Pernambuco or Bahia but merely calling in there, then how long would you estimate the voyage to take? I mean disregarding the time of unloading in those two ports, but taking into consideration calling in there. Do you understand the question, Captain?

(Deposition of Jens Hansen.)

Mr. LILLICK: I think that would be immaterial, because it would be only his opinion. It would not be material unless it was a representation made, and, of course, he was not in touch [134] with any of your people.

Mr. SCHULZ: Q. Before leaving San Francisco, did you have any conversation with the agents at San Francisco as to how long the voyage would take? A. No.

Q. You did not estimate that to the agent?

A. No.

Q. Did you advise your owners as to how long you expected the voyage to take? A. No.

Q. When did you book the freight for Montevideo, if you know? A. I don't know that.

Q. Did you stop for fuel at any point between Seattle and Buenos Aires?

A. We took on fuel at San Francisco at the same time we were unloading.

Q. At San Pedro? A. Yes.

Q. And that was the only fuel you took?

A. Yes, that was the only fuel we took.

Mr. SCHULZ: That is all.

Redirect Examination.

Mr. LILLICK: Q. Captain, on cross-examination you were asked whether the only delay by heavy weather that you experienced was that caused by the heavy weather they were talking to you about at sea, and in answer to that question you said "Yes." In so answering, had you thought of the testimony

(Deposition of Jens Hansen.)

you had given with respect to the lighters at Bahia?

A. I don't understand that question.

Q. On cross-examination you testified that the only heavy weather you experienced that caused you any delay was that at sea, or that about which you were being asked, and you said yes. On your direct examination you testified that at Bahia the lighters were not able to come out because of there being a heavy swell. How much time was lost at Bahia because of that heavy swell there?

A. About twenty-four hours. [135]

AMUND UTNE,

called for the respondent; sworn.

Mr. LILLICK: Q. What is your name?

A. Amund Utne.

Q. What is your connection with the motorship "Hindanger"? A. I am chief officer.

Q. How long have you been chief officer?

A. Since the ship was new.

Q. You joined her with the captain, did you?

A. With Captain Hansen, yes, at Newcastle.

Q. On Voyage No. 2, who stowed the eggs that you carried from Seattle to San Francisco?

A. We have a stevedoring company in different ports, but it is the chief officer's duty to see that the cargo is well stowed and in the proper place.

Q. And that was under your supervision, was it?

A. Yes, under my supervision.

[Deposition of Amund Utne.]

Q. Was there anything unusual in the manner in which the eggs were stowed? A. No.

Q. On the trip, itself, would you say that there was anything unusual about the trip?

A. No, nothing, at all.

Q. How long have you been in this trade?

A. I came over here in 1927.

Q. So that you have made this trip through the Straits of Magellan, as well as through the Panama Canal? A. Yes, I have.

Q. On Voyage No. 2, on the way down, in making the various ports of call, were those ports made in order? A. They were made in order, yes.

Q. On your stay at any one of these ports on Voyage No. 2, on the way down, was there anything unusual in the way of delay?

A. Well, it seemed unusual for us, but it is just the way they work down in South America; they work very slow.

Q. What do you mean by saying it seemed unusual to us? [136]

A. Because up here we can unload the same amount in one day that it takes one week to do in South America.

Q. That would apply to all vessels at all times, would it? A. Yes.

Q. With reference to engine trouble on the "Hindanger" on the previous voyage, there is said to have been some delay. Do you know what that delay was?

A. That was on the first trip, on Voyage No. 1.

[Deposition of Amund Utne.]

No, I cannot say that. I would have to look at the engine-room log-book.

A. At the engine-room log-book? A. Yes.

Q. Not the log you have here? A. No.

Q. Do you remember how long voyage No. 1 of the "Hindanger" took?

A. Not exactly, but I guess it was 50 days.

Q. How many voyages have you personally made through the Panama Canal from San Francisco to Buenos Aires?

A. The same as Captain Hansen has; this is trip No. 3.

Q. You have made two trips, and this is the third trip that you will have made after it had been finished? A. Yes.

Q. So you have but two trips on the "Hindanger" by which to judge of the time it would take to make the voyage from San Francisco to Buenos Aires? A. Yes.

Q. Even without the engine-room log, assuming that the "Hindanger" took 50 days on voyage No. 1, what would you say, from your recollection, would be the delay that was caused, or measured by hours or by days, due to that engine trouble?

A. I am going to speak the truth, here, but I cannot swear to it, but I think it was about 50 hours that we lost.

Q. About 50 hours? A. Yes.

Q. The captain apparently does not agree with you?

A. Well, as I say, I cannot swear to it. [137]

[Deposition of Amund Utne.]

Cross-Examination.

Mr. SCHULZ: Q. You stated that there was nothing unusual about this voyage; just what did you mean by that statement?

A. I mean that every trip you have some days of bad weather and some days of good weather, and you have to accept a little bit of everything, so I cannot tell you exactly.

Q. You don't mean that the voyage was the ordinary voyage of ships in the line of the Westfal-Larsen Co.; is that what you meant?

A. Yes, that is what I meant.

Q. Do you know how long the voyages of the other vessels have taken?

A. I guess it is about the same as we do.

Q. Do you know?

A. Not exactly, but approximately.

Q. In your opinion, could the voyage have been hastened by the use of due care at any place along the voyage? Could it have been made to go faster?

A. No.

[Endorsed]: Filed Dec. 26, 1930. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [138]

[Title of Court and Causes Nos. 20336-L and 20337-L.]

Friday, May 6th, 1932.

The COMMISSIONER: You may proceed.

Mr. SAPIRO: We will call Mr. Wintemute.

Mr. GRAHAM: May it please the Court, I would like to ask counsel for the Libelants if Mr. Wintemute is being called by the [139] Libelants as their witness.

Mr. SAPIRO: We are calling him for cross-examination as an officer of an adverse party.

Mr. GRAHAM: May it please the Court, the record does not disclose that Mr. Wintemute has either been sued as a party nor that he is an officer of any of the parties sued. I know of no practice in admiralty that permits of the calling of an adverse witness without making the witness the witness of the party calling him, and I would object to Mr. Wintemute testifying unless his testimony is taken to be the testimony of a witness called by the Libelants, and with which the Libelants would be bound.

Mr. SAPIRO: We would like a ruling on that. Of course we can show that he is a director. Will you stipulate that he is a director?

Mr. GRAHAM: I most certainly will not.

Mr. SAPIRO: Might we ask him one question as preliminary, your Honor?

The COMMISSIONER: Yes.

R. S. WINTEMUTE,

called for the libelants, sworn:

Mr. SAPIRO: Q. Are you a director of the General Steamship Corporation? A. Yes.

Mr. GRAHAM: If your Honor please, at this time I should like to offer a stipulation signed between the parties in these two cases.

Mr. SAPIRO: If we are going to try this case in order, I think we ought to have a ruling.

Mr. GRAHAM: You have asked him if he is a director. I want to show he is not qualified to testify in this case except as your witness. I have no objection to his testifying as your witness, Mr. Sapiro. In fact I was going to call him myself. [140]

Mr. SAPIRO: Why are you objecting then? I can not see why you are objecting.

Mr. GRAHAM: I will object to your calling him as a witness unless you make him your witness, and I think my objection is well taken.

The COMMISSIONER: Go ahead with the stipulation.

Mr. GRAHAM: Paragraph eight of the stipulation provides: "It is admitted that the General Steamship Corporation is and was the agent of Westfal, Larsen & Co. for all purposes expressed in the libel and with full authority to act on the matters set forth therein, and, being such agent, is not responsible for any damages found due herein."

[Testimony of R. S. Wintemute.]

At this time I will offer this stipulation, interrogatories and answers to the interrogatories, and ask that they be deemed a part of the case.

The COMMISSIONER: They may go in as part of the case.

Mr. GRAHAM: It occurs to me that the General Steamship Corporation, having been admitted to be only an agent, that it is incumbent upon Libelants to establish that this witness is either a party to the action or is a director of the remaining party, namely, Westfal Larsen & Co., which appears as a claimant and not as a respondent, and I do not believe that under any of the rules of admiralty with which I am familiar, that counsel has a right to call Mr. Wintemute without adopting him as his own witness.

Mr. SAPIRO: As a matter of fact that does not dismiss the General Steamship Corporation from the case. Under the stipulation we have admitted that the General Steamship Corporation was the agent of Westfal, Larsen & Co., and this man acted for the corporation, it can only act through a director or an officer, and he can be examined as the general agent under that adverse witness provision of the California Code of Civil Procedure as to the reception [141] of evidence.

Mr. GRAHAM: There is no such rule applicable in admiralty, Mr. Sapiro.

Mr. SAPIRO: The Federal Court certainly recognizes the adverse witness rule.

[Testimony of R. S. Wintemute.]

Mr. GRAHAM: It has never recognized any such rule that I know of, and I have been practicing admiralty for a good many years.

The COMMISSIONER: Let us proceed with the testimony with the understanding that he is Mr. Sapiro's witness now, and he will be your witness later.

Mr. SAPIRO: No, we want to call him for cross-examination.

The COMMISSIONER: I do not think that you have that power.

Mr. SAPIRO: Q. What is your name?

A. Royal S. Wintemute.

Q. And your residence?

A. You mean my house address?

Q. Yes. A. 2400 Hillsite Drive, Burlingame.

Q. What is your position with the General Steamship Corporation?

A. I am vice president in charge of the traffic.

Q. You are one of the directors?

A. I am one of the directors.

Q. You have held that position for some period of time?

A. I have, a little over a year.

Q. That is, you were vice president and in charge of traffic from January 1, 1931, would you say?

A. Yes.

Q. Now the General Steamship Company, it is stipulated, were the agents of the Westfal Larsen & Company line? A. Yes.

Q. I show you a circular of the Westfal Larsen & Company line, which bears the printed signature of

[Testimony of R. S. Wintemute.]
the General Steamship Corporation. That circular was one that was gotten out by the General Steamship Corporation? A. Yes.

Q. Do you know when that was printed?

A. It was printed, approximately, according to the card itself, in November, 1929.

Q. It was printed in November of 1929?

A. Yes. [142]

Q. That was distributed generally among the shippers? A. Yes.

Mr. GRAHAM: Let me ask at this time, what is the purpose of introduction or the offer of this circular?

Mr. SAPIRO: I think the thing should be obvious. We are going to show that they represented to the shippers who were served by their line of the length of the voyage of this vessel and of the time of stay at the various ports. I might state for the information of the Commissioner that this proceeding is based both on a breach of an agreement in reference to the length of the voyage and on an alleged deviation of the voyage based on a call at ports not listed on this sailing schedule, and also upon an undue stay at a port listed here for a stay of one day at which they stayed several days, as to which proof will be offered; this particular commodity involved is eggs, a commodity not only perishable, but as we will show, one that depends upon certain seasonal requirements in reference to its marketing ability.

[Testimony of R. S. Wintemute.]

We would like to offer this in evidence and ask that it be marked Libelant's Exhibit 1.

Mr. GRAHAM: At this time I should like to object to the introduction in evidence of any testimony or any exhibits or any extraneous evidence tending to vary the terms of the contract of the carriage under which these goods were moved. Mr. Sapiro has not seen fit to present an introductory statement in this case, and I think that if we did it might clarify the issues.

Mr. SAPIRO: You and the Court both asked me to proceed directly with the evidence.

Mr. GRAHAM: This case is being presented to your Honor on a stipulation, on answers to interrogatories, on the pleadings on file and has been referred to your Honor by Judge Louderback for hearing and decision. The case has been very much narrowed by the ability of counsel to stipulate on almost all of the facts. The [143] voyage of the vessel, the dates of arrival and sailing from the respective ports has been stipulated to. It is also covered in an answer to interrogatories which have been propounded. Have you a copy of that stipulation, Mr. Schulz?

Mr. SCHULZ: Yes, I have.

Mr. GRAHAM: It appears from the stipulation of facts entered into in this case binding upon the parties, that the vessel sailed from Seattle, Washington, on the 28th of March, called at San Francisco on the 8th of April and sailed from there on the 10th of April, called at Los Angeles on the 12th

[Testimony of R. S. Wintemute.]

and sailed from there on the 13th of April; called at Colon, Panama, at Pernambuco, on the 7th of May and sailed on the 8th of May, called at Bahia on May 10 and sailed from there on May 12th, called at Rio de Janeiro on the 15th of May and sailed from there on May 16th, called at Santos May 17 and sailed the same day, called at Montevideo on the 21st of May and sailed on May 29, arriving in Buenos Aires, the port of destination of the cargo shipped on these bills of lading, on May 29.

Now it is also stipulated that the bills of lading which are attached as Exhibit A to the answers to the interrogatories of the Respondent were the bills of lading which were issued for the transportation of these eggs. It is not stipulated that this bill of lading is the contract of carriage. It is the contention of the respondents that it is the contract of carriage, and that there is no other contract of carriage with these libelants.

At this time we object to the introduction of any parole evidence tending to show that any other contract was entered into with these libelants, and that the voyage agreed upon was other than that provided for in the bill of lading. For the purpose of making the situation more clear to the Court I have brought out a map, which I assume it will be agreeable to Mr. Sapiro and [144] associate counsel to show to the Court, being a map of South America.

Mr. SAPIRO: Surely.

Mr. GRAHAM: This map, if your Honor please, discloses that the voyage from San Francisco to the

[Testimony of R. S. Wintemute.]

respective ports, the names of which I have stated—

Mr. SAPIRO: Is it marked?

Mr. GRAHAM: No, it is not marked, I mean as to this voyage, it is just a map of South America. The map discloses, may it please your Honor, that the ports of call from the time the vessel left San Francisco to the time that the vessel arrived in Buenos Aires were all in geographical order and on the line of route of the vessel between those respective termini. Having that in mind we next refer to the clause in the bill of lading having to do with the voyage of the vessel.

The pleadings and stipulations in this case establish that this voyage was as I have described it to be. An examination of this map discloses that the ports of call were ports in geographical order and in the regular route of vessels making that trip. The Bill of Lading which has been set up in the answer and admitted in the pleadings to have been the bill of lading under which these shipments moved, provides in part as follows:

"The vessel to have liberty, either before or after proceeding toward the port of discharge, to proceed to the said port via any port or ports in any order or rotation, outwards or forward, whether in or out of or in a contrary direction to or beyond the customary or advertised route, to pass the said port for which the said cargo is destined, and to return thereto without the same being deemed to be a deviation, whatever the reason for calling at or entering said port or ports"—

[Testimony of R. S. Wintemute.]

Your Honor is familiar with a similar cause which has been [145] before the courts in this circuit in numerous cases, and has been ruled on. It provides, as your Honor will note, for latitude in the voyage. The bill of lading further gives other liberties which are not pertinent to the issues here.

It is our contention that this bill of lading and this liberty to call clause has acquired a fixed meaning by the decisions of the courts of the United States, and particularly of this circuit, and that having acquired a fixed meaning, parol evidence to establish any other meaning to contradict or to vary its terms is not admissible.

A recent case in this circuit is the Frederick Luckenbach, 15 Fed. ed. 241, in which the Court had a cause very similar to the one presented herein as far as the liberty to call clause in the bill of lading was concerned.

In that case the vessel proceeded from Portland to New Orleans via the Port of Seattle; after having left Portland it went north to Seattle, a distance of some 650 miles, and then returned on its route with its cargo for New Orleans. The Court held that that was not an unwarranted deviation, considering the terms of the bill of lading.

In the present case we have a voyage from Seattle to San Francisco, to ports in South America, all of which are in order.

The answers to the interrogatories in this case contend that the purported deviation consisted of a call at Pernambuco and Bahia. Reference to the

[Testimony of R. S. Wintemute.]

map will disclose that both of those ports are en route from the North Pacific Coast ports to the port of destination of the cargo, Buenos Aires.

The COMMISSIONER: Do you want this map introduced as an exhibit?

Mr. GRAHAM: I do not unless counsel for the libelants do.

Mr. SCHULZ: No. [146]

Mr. GRAHAM: I think the Court will take judicial note of the fact that these ports are in order.

Mr. SAPIRO: And I suppose it will take judicial note of the fact that Montevideo is right across the bay from Buenos Aires—about 74 miles, is it not?

Mr. GRAHAM: Whatever the map discloses.

In the early case of the Sidonian, 34 Fed. 805, affirmed in 35 Fed. 534, the Court had before it the question of the shipment of 1500 boxes of lemons from Genoa to New York. The Libel alleged damage to the lemons on account of the length of the voyage, owing to the fact that the vessel, after leaving Genoa, called at Palermo in Sicily. The bill of lading contained the following clause:

"With liberty to call at any port or ports, in any rotation, for any purpose whatever."

This case is of particular significance in view of the allegations of the libel that an oral agreement existed in the instant case between the libelant and respondent that the vessel would make another voyage than that made. (No mention is made of what voyage was orally agreed upon.) The court in its

[Testimony of R. S. Wintemute.]

decision, held as follows:

"It appears from the evidence that, prior to the shipment of these lemons, a quarantine had been established at the port of Palermo, whereby a vessel coming from Genoa was compelled, before entering the port of Palermo, to go to the island of Gaeta, and there remain for the period of 10 days. There is evidence to show that, prior to the shipment of the lemons the agent of the ship owner gave the shipper to understand that the ship would not call at Palermo on this voyage. But it also appears that, upon the shipment of the lemons, the bill of lading upon which this action is based was issued by the ship, and received by the shipper without [147] the fact of the establishment of the quarantine at Palermo being then known to all parties. Thereafter the ship called at Palermo, that being one of the ports ordinarily touched at by the vessels of this line on their voyage to New York, and in consequence was detained by the quarantine 10 days. Upon these facts the libelant asks at the hands of this court a construction of the bill of lading so as to exclude the port of Palermo from the liberty to call mentioned in the bill of lading, upon the ground that, after the establishment of the quarantine, the port of Palermo could not be entered under ordinary circumstances, and so was not within the contemplation of the parties to the contract. But I am unable to see how such a construction can be given to the bill of lading. The words of the liberty to call are plain, and clearly include the port of Palermo. If

[Testimony of R. S. Wintemute.]

the shipper had desired to exempt the port of Palermo from the liberty to call contained in the bill of lading, because of the quarantine then known to have been established, he should have procured a modification of the bill of lading. Instead of so doing he accepted the bill of lading without objection, and now brings his action upon it. It is impossible to permit him to recover in such an action, without setting aside the established rule which makes the written contract the evidence of the agreement between the parties. The libel must be dismissed, and with costs."

In the present case the libel alleges that the bill of lading on the Seattle cargo was issued on the 28th of March and on the San Francisco cargo on the 7th of April; in both cases the vessel sailed subsequent to the issuance of the bill of lading and receipt of the goods.

The case of the Sidonian is one of the leading cases in this country; it has been cited with approval on innumerable occasions.

In the case of the South Atlantic Steamship Line vs. London- [148] Savannah Naval Stores Co., The Circuit Court of Appeals of the Fifth Circuit, 255 Fed. 306, there was involved a shipment of goods.

I would like to state that the purpose of this argument at this length and at this time is on account of the fact that the libel alleges the ground of recovery to be based upon an oral contract; the oral contract is denied in the answer, and clearly the question of the admissibility of evidence of the oral

[Testimony of R. S. Wintemute.]

contract, is not only persuasive, but we deem it to be conclusive as to the issues here presented, and if libelants can not establish an oral contract, or if evidence of the oral contract is inadmissible, as we claim it to be, the libelants have no standing in court.

The case of South Atlantic Steamship Line vs. London-Savannah Naval Stores, Fifth Circuit, 255 Fed. 306, involves a shipment of goods from Pensacola, Florida, to Bristol, England. In that case the libelant objected to a call at European Continental ports prior to putting in at Bristol. In denying the right of the libelant to direct voyage, the court held, in part, as follows:

"As shown by the terms of the bill of lading stipulated for, the vessel carrying the libelant's rosin and turpentine was to have—'liberty to call at any port or ports, in or out of the customary route, in any order whatsoever, to receive or discharge coals, cargo, passengers, or for any other purpose.'

"There is no law standing in the way of a shipper under a maritime contract binding himself by an agreement that the vessel carrying his goods, constituting only a part of its cargo, is to have the privilege expressed by the provision just quoted. No right of a shipper under such a contract is violated by the vessel carrying his goods going to the port to which they are destined by way of another port, in or out of the customary route, for the delivery of other goods shipped to such other port. Austrian Union [149] Steamship Co. v. Calafiore, 194 Fed. 377, 114 C. C. A. 295, was a case of a shipment under

[Testimony of R. S. Wintemute.]
a bill of lading containing a provision quite similar to the one above quoted. In the opinion of this court rendered in that case it was recognized that the stopping of the vessel at another port before reaching that to which the complaining shipper's goods were destined could not have justified the complaint made, but for the fact that the stop which was made was for a purpose not proper or necessary to the voyage in which the ship was engaged.

"In the instant case it was not indicated by the tender made or otherwise that the vessel tendered would stop anywhere or do anything not proper and necessary to such a voyage as was in the contemplation of the parties when the contracts were made. The shipper's acceptance of the tender would not have involved the loss of any right to which its contracts entitled it. The contracts do not entitle the libelant to demand the furnishing of the freight room contracted for, with the condition added that the voyage of the vessel tendered be different from the one contemplated by both parties when the contracts were made. All that libelant was entitled to was performance of the contracts. Its rejection of the tender because of the respondent's noncompliance with an unwarranted demand that it forego the right which the contracts reserved to it of going to Bristol by way of a continental port justified the respondent in treating the contracts as canceled."

In that case the vessel owner tendered a ship and the shipper refused the ship and the court held that that was a breach of the contract by the shipper.

[Testimony of R. S. Wintemute.]

In the case of the Panola, 1925 A.M.C. 1173, the court had before it a shipment of flour from Philadelphia to Helsingfors, Finland. After loading the flour and issuing a bill of lading dated August 31, 1921, at which time it was expected that the [150] vessel would begin its voyage on or about September 5th, the vessel finally started for New York City on September 8th, and remained there until September 30th, returned to Philadelphia and remained there until October 5th, and finally arrived at destination about November 5th. On the arrival of the flour, the buyer refused to accept it on account of delay in making delivery, and suit was commenced for damage alleged to have been caused thereby. In construing the bill of lading in reference to the voyage pursued, the court analyzed and referred to many of the leading decisions on the subject of deviation, commencing with The Sidonian, supra, and including the South Atlantic S. S. Line case, supra, and The Neshaminy, infra, and held that the vessel owner was neither liable for the deviation in proceeding from Philadelphia to New York and returning before going to Europe, nor for the delay of 35 days, recognizing that the vessel was a general ship and that the cargo owner had not contracted by the bills of lading for other than the voyage pursued.

A leading English case on the subject is that of Hadji Ali Akbar and Sons Limited v. Anglo-Arabian and Persian Steamship Company, Limited, 10 Aspinwall's Maritime Cases, page 310, wherein the character of vessels similar to the "Hindanger" was

[Testimony of R. S. Wintemute.]

described by the court as being a general ship.

In the instant case there can be no doubt and the deposition of the master establishes it to be a fact that the "Hindanger" was a general ship engaged in the carriage of general cargo as a common carrier for all those who offered cargo to it.

Mr. SAPIRO: You are making your argument based on that deposition?

Mr. GRAHAM: We are making it on the deposition, and is there any doubt that the "Hindanger" was a general ship? Is that denied?

Mr. SAPIRO: You can draw your own conclusions from the deposition. [151]

Mr. GRAHAM: Mr. Sapiro has raised the queston as to the depostion, and if there be any doubt by reason of that deposition, that the "Hindanger" was a general ship, I shall establish that by proof of witnesses.

In the Hadji Ali Akbar and Sons Limited vs. Anglo-Arabian and Persian Steamship Company Limited case, the court said:

"It is upon these so-called 'liberties' that the defendants rely as justifying the change of destination at Oran and the transshipment of the plaintiffs' goods into the Emperor at Cardiff. I think the defendants are right. No doubt the object of the bill of lading contract is that the plaintiffs shall have their goods carried to London, and if the liberties were of such a kind that if put into operation they would defeat the object, it might be possible to disregard them in construing the document. They are,

[Testimony of R. S. Wintemute.]
however, not of such a kind. It is to be remembered that the defendants' ships are general ships soliciting cargo in and about the Persian Gulf for carriage to different ports in the West. They may get much or little for this or that port, so little sometimes that, from a business point of view, it would be out of the question to send the ship there. Yet a bill of lading, such as the one sued on, would be issued to the shipper: he would, however, know quite well that if there happened to be little cargo on board for that port the ship would probably make for some other destination to which it would be more expedient to go, and would send forward his goods to their destination by transshipment. The shipper gets an advantage in this way, because, if the ship were bound by the contract to go to the port of destination of each particular parcel of goods carried, the rate of freight would necessarily be very high, so high indeed, as frequently to prohibit trade.

"It is for these reasons that the liberties relied on are inserted in the bill of lading. Their meaning is plain. They are [152] reasonable, and instead of defeating the object of the shipper, they enable that object to be attained in the cheapest, and possibly the only way. I am, therefore, of opinion that the defendants were justified in altering the first destination of the vessel from London to Cardiff and that by so doing they in no way forfeited their right to rely upon the exceptions as to the perils of the sea.

"Among the excepted perils is set out in the bill of lading is one numbered 16. It is as follows:

[Testimony of R. S. Wintemute.]

'Should the ship for any cause whatever not call at the port for which goods have been shipped, the owners or agents of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line. Should the goods for any cause be forwarded by steamer of any other line, shippers and consignees are to be bound by all clauses and conditions of the usual bill of lading of such steamer.' Why this passage is included among the exceptions I do not know, but it is relied upon by the plaintiffs as limiting the shipowners' liberty of transshipment to a transshipment into a 'liner' as distinguished from a small trading steamer such as the Emperor. I do not, however, think that the words 'other line' are used here in any other sense than as meaning another steamer. Nor do I think that the passage has any relation to the liberties contained in the earlier part of the bill of lading, or that it can be read as cutting down or qualifying those liberties. In this case the damage done to the plaintiffs' goods was caused by an accident for which the defendants neither were by their contract nor have by their conduct made themselves responsible, and judgment must be in their favour, with costs."

In the present case the "Hindanger" was such a ship, carrying [153] cargo from North American ports to South American ports. Under such circumstances there can be no doubt, we submit, that the bill of lading issued for the carriage of these

[Testimony of R. S. Wintemute.]

goods has attained a fixed meaning permitting the vessel's calling at the respective ports at which it had cargo to load or discharge on the voyage in question, and that such calling did not constitute an unwarranted deviation to render the carrier liable for loss of market occasioned by any delay.

We contend that this bill of lading has acquired a fixed meaning, and having acquired a fixed meaning, no evidence of an extraneous nature, parol or otherwise is permissible to establish a meaning not already fixed by the court of this, and other circuits of the United States.

Of the recent cases in this circuit is that of the "Tokuyo Maru." I have not the citation of it here but I will furnish it and present it to the Court. In that case this court decided on a bill of lading similar to the one at issue here, that a voyage from Chile to Honolulu might well be undertaken via San Francisco without claim of deviation rather than a direct voyage. A suit was commenced for loss of cargo on that voyage and was dismissed. In addition, the Circuit Court of Appeals affirmed the dismissal.

I think the best known case on the subject of deviation and the introduction of parol evidence in this circuit is the West Aleda, tried in the District Court in 1925 and affirmed by the Circuit Court of Appeals in 1926. This case was reversed by the Supreme Court of the United States on a question involving the time within which suit could be commenced against the Emergency Fleet Corporation,

[Testimony of R. S. Wintemute.]

but the law on the subject of deviation and the introduction of parol evidence stands as affirmed by the Circuit Court of Appeals.

Mr. SAPIRO: What is the citation? [154]

Mr. GRAHAM: The West Aleta case is 1925 A.M.C. 1427 in the District Court and 1926 A.M.C., 855 in the Circuit Court of Appeals. I have not the citation in the Supreme Court but I can assure you that the reversal was on the ground stated because my firm represented one of the parties in that case.

In the West Aleta case efforts were made by the respondent to introduce parol evidence in the form of letters, booking engagements, advertisements, declarations of the parties to establish that the vessel was entitled to make a voyage other than that fixed by the law for a vessel of that character, and the courts, both the District Court and the Circuit Court of Appeals refused to permit the introduction of such evidence, holding the vessel to the voyage as specified by the bill of lading, being a direct call at the ports in question.

Now we submit, your Honor, that having established that the call at the respective ports was warranted, that is, a call in geographic order, at ports passed or to be passed on the voyage in question, and that no unwarranted deviation occurred by the fixed law of the United States, and that this bill of lading and the provisions therein contained having to do with liberty to call, has a clear and fixed meaning, we submit that it is elemental that

[Testimony of R. S. Wintemute.]

evidence of any oral contract, parol character, advertising circulars, or in fact any extraneous evidence whatsoever, is inadmissible. The subject of the admissibility of parol evidence to vary the terms of a written contract, and particularly the bills of lading, has been the subject of discussion on innumerable occasions before many courts, and I have cited the case of the West Aleta as typical. That case was decided in this circuit.

In the case of The Panola, 1925 A.M.C. 1173, decided by the Circuit Court of Appeals for the second circuit, a witness for the plaintiff complained that the vessel had not made the voyage [155] as represented, and that the vessel's owner was liable. In that case there was a delay of 35 days on a voyage from Philadelphia to Belgian ports on the other side of the Atlantic, a distance of probably half as much as the distance from San Francisco to Buenos Aires, which is about 9500 miles. In the case of The Panola the court held:

"In Leduc vs. Ward, 20 Q.B.D. 475, 6 Asp. Mar. L. Cas. 290, Lord Esher said: 'If the bill of lading is wrong as to the goods put on board, its effect is destroyed for any other purpose. But if the goods have been received on board, the bill of lading is more than a receipt, it is a contract of carriage.' "

In the present case there is no doubt that the goods were received on board. The pleadings establish that the vessel sailed after the goods were not only received on board, but after the bills of lading issued. We contend that it is the full contract of

[Testimony of R. S. Wintemute.]

carriage between these parties.

"The contract between a ship and the shipper is found in the bills of lading delivered to the shipper. They constitute the contract and bind the shipper although not signed by him if delivered to and accepted by him without objection and in the absence of fraud."

The court cites many decisions therein, including the Henry B. Hyde, 82 Fed. 681, 683. That case was decided in this circuit and is a well recognized authority on the subject.

In McMillan vs. Michigan Southern &c. R. R. Co., 16 Mich., 79, 112, Mr. Justice Cooley said:

"A bill of lading proper is the written acknowledgment of the master of a vessel that he has received specified goods from the shipper, to be conveyed on the terms therein expressed, to their destination, and there delivered to the parties therein designated. Abbott on Shipping, 322. It constitutes the contract between [156] the parties in respect to the transportation, and is the measure of their rights and liabilities, unless fraud or mistake can be shown . . .

"Bills of lading are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in its receiving and acting upon it. This is the case with deeds-poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not

[Testimony of R. S. Wintemute.]

perceive that bills of lading stand upon any different footing.

"In Glyn vs. East & West India Dock Co. (1882) 7 A.C. 591, 596, Lord Selbourne said:

" 'The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner.'

"In the Supreme Court in The Delaware, 14 Wall. 579, it was held that the bill of lading imported a contract and that evidence to vary it ought not to be admitted.

"And Carver on Carriage of Goods by Sea (6th ed.) Sec. 50, speaking of a bill of lading, states that it 'sets out the fact that the goods have been shipped and the terms upon which they are to be carried and delivered.' "

It will be noted particularly that not only did the court hold that parol evidence was not admissible, but in addition that the bill of lading was the contract of carriage, and not merely a receipt, where the goods were in fact loaded on board.

I have already referred you to the case of The Sidonian and the West Aleta.

The Supreme Court in The Delaware, 81 U. S. 579, 20 L. Ed. 779, [157] held, in part, as follows:

"If there is any rule of law which is settled beyond contradiction, it is the rule that parol evidence is inadmissible to vary the terms of a written contract."

[Testimony of R. S. Wintemute.]

In that case the question presented was whether parol evidence tending to show the knowledge of the shipper as to deck stowage was admissible after it had been shown that as a matter of law the issuance of a clean bill of lading without notation as to stowage imported under-deck stowage. Similarly, in the instant case, the bill of lading on which these goods were carried imported a voyage such as that made by the vessel as indicated by the foregoing decisions.

In The Delaware, the court held, further:

"Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import; and it is also admissible in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to after a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law."

"Verbal agreements, however, between the parties to a written contract, made before or at the time of

[Testimony of R. S. Wintemute.]
the execution of the [158] contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract.

"Apply that rule to the case before the court and it is clear that the ruling of the court below was correct, as all the evidence offered consisted of conversations between the shippers and the master before or at the time the bill of lading was executed."

An early case is the Golden Rule, 9 Fed. 334, where evidence of conversations between the draymen and the Steamship Company were sought to be introduced and the court held:

"Such a defense can not be listened to, as otherwise every bill of lading could be altered or varied by the recollections of a steamboat mate, or the interference of disinterested parties. The carrying contract, reduced to writing in a bill of lading, can no more be altered or varied by parol evidence than any other written contract."

There are two leading English cases on that subject, and I won't read them, Margetson vs. Glynn, 1892 1 Q.B.D. 337, and I think perhaps the leading English case on the subject of parol evidence and deviation is Leduc vs. Ward, 20 Q.B.D. 475, 1888, 6 Asp. Mar. Cases 290. This case of Leduc vs. Ward has been cited with approval in, I believe most if not all of the leading cases on the subject of deviation, and admissibility of parol evidence in this

[Testimony of R. S. Wintemute.]

country, and certainly in this circuit, it was cited with approval and deemed to be authoritative in the case of the West Aleta.

In that case the court held:

"The general doctrine of law is applicable, by which, where the contract has been reduced into a writing which is intended to constitute the contract, parol evidence to alter or qualify the effect of such writing is not admissible, and the writing is the [159] only evidence of the contract, except where there is some usage so well established and generally known that it must be taken to be incorporated with the contract."

Similarly, in 3 Jones on Evidence, Sec. 459, the question of the introduction of parol evidence is well put as follows:

"Parol evidence is admissible to explain a recital in a bill of lading under which cotton was shipped on a steamboat, that it was the custom for steamboats to carry barges in tow, and to store freight at their option, *wither* on the boat or the barge. But where the law has attached a fixed and certain meaning to words used in a bill of lading, evidence of a usage to change this meaning is not proper."

Another case is Frenzer v. Frenzer, 2 Fed. 2nd 218, on the general subject of inadmissibility of parol evidence.

The case of Higgins vs. United States Mail Steamship Company, Federal Case No. 6469, was one where a bill of lading was issued for the carriage of coal from New York to Havana, without

[Testimony of R. S. Wintemute.]

any mention of the number of days within which the coal should be discharged. Similarly in this case there is no mention of the number of days within which the voyage should be pursued, nor the ports at which the vessel would call en route. In that case it was sought by oral evidence to establish the limitation as to the number of days for discharge similarly as in this case it is sought by parol evidence to establish the limitation of the number of days of the voyage and the ports to which the vessel had called. The court held, in the Higgins case:

"It is undoubtedly true that this instrument is open to explanation, to a certain extent, as between the original parties, to correct mistakes or imposition upon the master. So far as it partakes of the nature of a receipt, it may properly be explained, [160] and is not conclusive."

I emphasize this for this reason, that it is undoubtedly a fact that the law is established that as far as a receipt is concerned, bills of lading may be explained by parol evidence. As the Court knows, the bill of lading has a three fold purpose. It is the document of title, the contract of carriage, and a receipt. I think the law is established that as to its purpose in serving as a receipt, parol evidence is admissible to show that the goods indicated as having been shipped on the bill of lading were not in fact shipped. The Higgins case recognizes this.

"But I have seen no case that has gone to the length of varying a contract by parol, in respect to

[Testimony of R. S. Wintemute.]

a matter such as that in question here. According to the construction of the bill of lading, excluding interpolations by oral evidence, the delivery of the coal would be governed by the custom and usage of the delivery of cargoes of that description at the port of Havana. The oral evidence, therefore, changes entirely the legal effect of the instrument. Even were I more doubtful than I am as to the application of the rule excluding parol evidence of the contract, the omission to insert it in the bill of lading would lead me to incline in favor of the testimony of the witness who denies that any such contract was made. Whether it was made or not depends upon the evidence of the two parties who entered into the contract of shipment. Their evidence, as I have said, is directly in conflict. I therefore lay out of the case the oral agreement set up by the libelant."

A recent case in this district is the Western Lumber Mfg. Co. vs. United States, 9 Fed. (2d) 1004, in which Judge Kerrigan, in reference to alleged special agreements in connection with the carriage, excluded parol evidence. Judge Kerrigan decided the West Aleta case. [161]

In the present instance we submit that from these authorities the provisions of the bill of lading have acquired a fixed meaning permitting the vessel to call at ports of call made on this voyage which ports had been stipulated to, and as indicated by my argument, having acquired a fixed meaning, we submit that the law is established

[Testimony of R. S. Wintemute.]

that extraneous evidence is inadmissible to change or alter that meaning, and we object to the introduction of any testimony in that respect.

Mr. SCHULZ: May it please your Honor, at the outset it would no doubt have been proper for us to have made a short statement of what we intended to prove, but your Honor suggested that a witness be called at once and we did not do it. I think at this time we would state what we intend to prove so that the proper background may be shown.

The real gist of the case is the question as to whether or not an oral contract was entered into between the parties prior to the shipment having been made whether that oral contract specified the terms of the shipment with respect to the sailing dates and the duration of the voyage, and whether or not that oral contract was breached, first, prior to the sailing, prior to the execution of the bill of lading, and secondly, after the bill of lading had been executed. Now that will be the case that we will prove in both cases, which are two consolidated cases: the same voyage is involved.

It will further be shown that the sailing which they made constituted a deviation under the terms of the contract of carriage. The evidence which is objected to at this time consists of a sailing schedule of the Westfal Larsen Company Line. Obviously on the question of proving whether or not an oral contract was entered into and what the terms of that oral contract were, it is proper to consider the background of the situation. [162] It has been done

[Testimony of R. S. Wintemute.]

in various cases; for example, in the case of The Ablanset, 25 A. M. C. 560, the advertisements in the paper were considered, as stated by the court, part of the negotiations that were carried on.

The issue of law which I believe counsel for the respondents has overlooked is the question of whether or not when an oral agreement has been entered into, a subsequent bill of lading governs and cannot be varied by the terms of that oral contract. It is our purpose to show, and we will show that the entire contract was fixed by this prior oral agreement. Under those circumstances the cases are perfectly clear, I think, that if the bill of lading does not conform to the original contract—I am reading from the case of United States vs. Fisher Flouring Mills Co., 1924 A. M. C. 533, 295 Fed. 691:

> "When the bill of lading does not conform to the original contract of carriage, the bill of lading must yield in the absence of proof that the parties intended thereby to create a new agreement."

Now I do not recall for sure those are the exact words, but it is in substance the case. In that case, the case of the Citta Di Palermo, 153 Fed. 378 was cited in support of this proposition, and that case involved an oral contract and a subsequent bill of lading issued.

Now our proof as I say, will go to the question of whether this oral contract was entered into and whether it was breached, first by failure to sail at

[Testimony of R. S. Wintemute.]

an earlier date than the sailing was made, and secondly, by the voyage made under the bill of lading. The cases cited deal with the question of whether these deviation clauses are valid as a general proposition. There is no doubt that many of them are. This particular clause we believe to [163] be invalid because it provides for a total abandonment of the voyage. However, these deviation clauses are upheld in a good many cases, but there is no case with which I am familiar, where the prior oral contract where it specified the time, did not control.

I do not think that it is proper at this time, on the introduction of this evidence, to go into the question of whether or not it is possible for the voyage made to constitute a deviation. I would like to point out, though, in the very recent case of the Hermosa, in 1931, A. M. C. 1075, it was held that a delay of 27 hours in sailing constitutes a deviation. This vessel was, as will be shown, agreed to sail on the 2nd of April from San Francisco, the 20th of March from Seattle, and actually sailed on the 28th of March from Seattle and 10th of April from San Francisco, a substantially greater deviation.

The purpose of the introduction of this schedule and of subsequent evidence which we wish to offer is the development of an oral contract. It will be shown that it was made in stages, that this was a part of the background of it; that subsequently there were conversations extending over a period of approximately a month and a half or two months, all of which were fixing, from day to day the par-

[Testimony of R. S. Wintemute.]

ticular event of the contract, terms of the schedule, the rates, etc. These matters are all matters which go to the proof of the oral contract. I believe there is no question but that this evidence is admissible, certainly for the proof of the oral contract, and that this evidence of the schedule has been held to be of considerable importance in determining whether or not a deviation occurred. One case that I would like to consider is the case cited by Mr. Graham of the "Tokuyo Maru" in which case great stress was laid upon the fact of the schedule, of the fact that that schedule was known to the shipper, who [164] was the agent of the shipper at the point of origin, and from the very cases that Mr. Graham cited it is obvious that the sailing schedule and the advertisements are of considerable importance in determining whether a deviation occurred.

Mr. GRAHAM: I am familiar with the cases referred to by counsel for the libelants and I do not know that any of them establish any different rule than the rule that I have shown to have been established by the citations which I have read. The question of the validity of this particular deviation has already been the subject of argument before Judge Louderback on an exception to the answer. The answer set up the bill of lading and the deviation clause and the right to make the voyage which the vessel did in fact make. Counsel for the libelant filed exceptions to the answer raising the ques-

[Testimony of R. S. Wintemute.]

tion of validity and propriety of the deviation with respect to the particular voyage, because the answer also set forth the voyage which was made. After argument and extensive briefs, I believe four or five briefs were filed, the exceptions raising the point of the invalidity of the deviation clause were overruled, the effect of which undoubtedly is that this court has already established that this deviation clause in this case is binding on the parties and is valid.

In the case of The Hermosa, which counsel refers to, with which I am also familiar, having tried that case in our office, it was established that the delay was occasioned by the negligence of the ship owner. It was established that the master was intoxicated and that this caused the delay. Parol evidence was not introduced and for the purpose of varying the terms of the contract, the meaning of which had been fixed; in addition to which, in that case, the bill of lading for the carriage of a shipment of tomatoes was issued after the cargo was on board the ship. But in this case the pleadings establish that the bill of lading was [165] issued before the cargo was ever shipped, and at a time when the parties could have objected to it if they wanted to; in the words of one of the cases already cited, the parties did not contract for a voyage other than that which they got.

I appreciate that the purpose of the introduction of this extraneous evidence is for the development of an oral contract. We submit that the purpose

[Testimony of R. S. Wintemute.]

is not sound, because of the fact that the oral contract itself is inadmissible and that the bill of lading is binding on the parties, has acquired a fixed meaning, permitting the vessel to make the voyage it should make, and no other extraneous evidence is admissible.

Moreover if, as counsel states to be the fact, libelant's whole case is based upon an oral contract, we should elect at this time to move for a dismissal of the actions. The pleadings establish already that the voyage began, and the existence of the contract in the bill of lading, and there is no further proof necessary at this stage of the case in behalf of the respondents.

Mr. SAPIRO: Of course counsel's statement is incorrect, as well as his general conclusion from his citation of authorities. His citation of authorities refers only to cases where there were plain deviations under a bill of lading and then the parties attempted to prove that there were some oral statements in reference to the course of the ship. Here we are setting forth that there was an oral contract of affreightment, and he has not submitted any authorities to deny the fact. The cases cited by Mr. Schulz, and some other cases that we can cite your Honor—we will submit a memoranda—hold uniformly that an oral contract of affreightment is binding, that that contract is not set aside by a subsequent bill of lading unless there is a specific agreement as to any condition that may be inconsistent in the bill of lading, [166] that is the

[Testimony of R. S. Wintemute.]

ship, in issuing the bill of lading, would have to point out to the shipper that there might by any provision in the bill of lading inconsistent with the prior oral contract and have the shipper accept that bill of lading as to its inconsistent provision before it could take the place of any subsequent bill of lading. As far as after the bill of lading is issued before the goods were loaded, and after the breach of the alleged oral agreement, the authorities are uniform in holding that that does not constitute a waiver of the breach, if a party is placed in the position that these parties were by these people, where they were preparing for a shipment of eggs to South America and then this ship breached its oral agreement, and the ship did not leave at the time it was scheduled, the mere fact that we had to get these eggs eggs there and loaded the eggs on the vessel when it was some days late did not waive the previous breach, nor would it waive our right to damages. That is held in the authorities which we can cite to you if you want to take them at this time, although I do not know why we should brief a case in advance of the trial of the case.

As far as the deviation is concerned, the question as to the validity of the bill of lading is still open as is also the question as to whether or not the unusual stay at one of these ports as well as the call at other ports—counsel is incorrect in stating that the ship merely called at two other ports which were not on the schedule as presented to the shippers. In addition there was an unusual delay at this

[Testimony of R. S. Wintemute.]

port of Montevideo, which is 74 miles from Buenos Aires, where there was to be a one-day stop, but there was approximately a nine-day stop, which resulted in a destruction of the value of these perishable goods that were aboard that vessel, and all of these facts contributed to the deviation and all of these facts—that is, this evidence [167] tendered now is not only of import for the purpose of establishing an oral contract of affreightment, which is a binding contract, but is also of import in relation to the matter of deviation in the representation as to what is their customary voyage and what would be considered unusual and unreasonable delay.

Mr. GRAHAM: I think if we might stick to the question of law presented and not the facts in connection with what counsel seeks to prove by reason of an oral contract, purported oral contract which is void, we might reach a speedy conclusion.

In the case of Higgins vs. United States Mail Steamship Company, Federal Case No. 6469, which I have already quoted your Honor, and contrary to Mr. Sapiro's belief on the subject, evidence was sought to be introduced to establish an oral agreement made prior to the issuance of the bills of lading, just exactly the situation alleged to have existed in the present case, and in that case the court held that this evidence was inadmissible. He sought to distinguish between the admissibility of evidence in connection with the purpose of the bill of lading when used as a bill of receipt, and its inadmissibility when used as a contract, and we

[Testimony of R. S. Wintemute.]

submit this case alone is authority for our proposition.

The COMMISSIONER: Suppose we admit this testimony subject to your motion to strike out. I want to read your authorities, and I will do that, admit the testimony subject to your motion to strike out. Is that all right?

Mr. GRAHAM: If your Honor does not want to rule on it now.

The COMMISSIONER: No, I would not want to rule on it now. I am inclined to rule with you, but I will let this go in subject to a motion to strike out. It will be marked Libelant's Exhibit 1. We will take a recess until 2 o'clock.

(The schedule is marked "Libelants' Exhibit 1.") [168]

Afternoon Session.

R. S. WINTEMUTE.

Direct Examination (Resumed).

Mr. GRAHAM: At this time I should like to move for a dismissal of the General Steamship Corporation from both these suits. I think the dismissal follows and is in order from the stipulation entered into between the parties. The stipulation provides in paragraph 8:

"It is admitted that the General Steamship Corporation is, and was, the agent of Westfal, Larsen & Co. for all purposes expressed in the libel, and with full authority to act on the matter set forth

[Testimony of R. S. Wintemute.]

therein, and, being such agent, is not responsible for any damages found due herein."

Now the law, of course, is elemental that in such a suit where an agent and principal are sued, that there is no liability on the part of the agent, if there is on the part of the principal. In this stipulation we have admitted that the agent would not be responsible for any damages, so therefore there is no cause of action as to it as agent, and we formally move that the suit be dismissed as to the agent, General Steamship Corporation and the dismissal entered at this time.

The COMMISSIONER: You have no objection to that at this time, have you?

Mr. SAPIRO: We have no objection. We think that probably it would be better to do this at the end of the case. That apparently was the intent of the stipulation, that no judgment would be rendered against this particular respondent.

The COMMISSIONER: My order will be that the General Steamship Company, a corporation, may be dismissed in cases 20337 and 20336-L, pursuant to stipulation.

Mr. GRAHAM: I have another motion in connection with [169] Exhibit 1, and it is also a motion against the admissibility of this document in evidence at all. The document shows that it was dated November, 1929. The pleadings show that the shipment in question was in March and April, 1930, and it is my belief that this exhibit is remote in time and has no bearing on the issues presented here at

[Testimony of R. S. Wintemute.]

all and is not admissible in evidence at all. The answer to the 6th interrogatory states, "Said oral contract was completed on or about March 10, 1930, based upon negotiations had between January 27, 1930, and March 10, 1930."

Now it seems to me that unquestionably the libelants are bound by that statement if by no other facts, and in addition to my contention that this exhibit is remote in time, it is not admissible under these pleadings even, and I move it be not admitted for any purpose.

Mr. SAPIRO: Counsel is very full of objections, and I think we could have expedited this thing and probably tried it in two hours if he had stated his main objection and reserved his argument. But as far as that situation is concerned, this particular exhibit covers the whole list of sailings from San Francisco, for instance from December 27 to and including March 18. There is a whole group of vessels, and it was a piece of advertising that was used during this whole period of time, and the mere fact that it might have been printed in November of 1929, I don't know where he gets that idea, because if it was published then it was for 1930 shipments.

The COMMISSIONER: I will pass on that at the same time that I pass on your motion to strike out.

Mr. SAPIRO: Q. Now referring to this exhibit, there appears on there the schedule of a motor ship "Hindanger" which was to leave San Fran-

[Testimony of R. S. Wintemute.]

cisco March 18—what year was that?

A. That was in 1930. [170]

Q. March 18, 1930? A. Yes.

Q. You gave these out in 1931, didn't you?

A. In 1930.

Q. That was the year that this shipment was made? A. Yes.

Q. The motorship "Hindanger" described there is the ship which is the subject matter of these libel proceedings? A. Yes.

Q. And the voyage dated March 18 is the voyage which is the subject matter of these libel proceedings, although it did not start on that date?

A. Yes.

Q. Now this card was generally distributed, was it, among those persons whom you expected to be shippers?

A. Generally distributed amongst the trade.

Q. And referring to this card, steamers leaving in December, 1929, from San Francisco to and including March, 1930, are indicated? A. Yes.

Q. Do you remember that a copy of this was delivered to the Pacific Egg Producers?

A. I don't know. I did not have charge of the mailing list.

Q. Who has charge of the mailing list?

A. Parties in our office.

Q. Who?

A. The mailing list is made up, by those in my department who are responsible for that detail work.

[Testimony of R. S. Wintemute.]

Q. In negotiating in reference to space on this steamer with any shipper, you would generally give out one of those during that period? A. Yes.

Q. You carried on certain negotiations with the Pacific Egg Producers Cooperative in regard to this space, did you not? A. Yes.

Q. They were furnished with the information that was on this advertisement?

A. In connection with that card, are you referring to this particular shipment?

Q. Well, when did you begin negotiations with them?

A. I did not begin negotiations with them. I began negotiations with Mr. Walter Van Bokkelen about the first of March. [171]

Q. That was the only negotiations you had in reference to these shipments? A. Yes.

Q. Had you had any prior ones wherein you met Mr. Benjamin and Mr. Rother?

A. Not in connection with the "Hindanger" shipment.

Q. With any shipment in general?

Mr. GRAHAM: I object to that. I do not think we are interested in shipments in general.

The COMMISSIONER: I will sustain the objection.

Mr. SAPIRO: Q. You had negotiations with them in reference to shipments on the steamers of Westfal, Larsen Company line from San Francisco and Seattle to Buenos Aires for the spring of 1930, did you not?

[Testimony of R. S. Wintemute.]

Mr. GRAHAM: I object to that; the motorship "Hindanger" is the subject of this suit and we are not interested in general negotiations in connection with any other ship.

The COMMISSIONER: Aren't you confined to the voyage in question?

Mr. SAPIRO: No, if they agreed, for instance, suppose he agreed in January that "We will take whatever cargo you may want to ship to Buenos Aires on our line" in connection with the ship's sailings that he has here at so much, for instance, fixes a cargo rate, the mere fact that at that time he did not name the "Hindanger" would not prevent you later from establishing and connecting the conversation with the two. Here is a course of circumstances.

The COMMISSIONER: I will allow it.

Mr. GRAHAM: Note an exception.

A. Yes, I did.

Mr. SAPIRO: Q. At that time, do you know whether you had this card before you in the course of the negotiations?

A. I do not. [172]

Q. You don't remember? A. No.

Q. This card shows that the voyage of the "Hindanger" from San Francisco would be 32 days: Is that correct? A. May I look at that?

Q. Yes. A. Yes, that is correct.

Q. And that was the scheduled time of the "Hindanger", the scheduled time of the voyage?

Mr. GRAHAM: When?

[Testimony of R. S. Wintemute.]

Mr. SAPIRO: At any time.

A. On that particular trip it was, as far as we could see at that time.

Q. Is it not a fact that you generally advertised that the voyage was from 32 to 35 days? A. No.

Q. Can you identify the signature of Mr. Rali?

Mr. GRAHAM: We admit it. A. Yes.

Mr. SAPIRO: Q. Did you confer with him in relation to that matter?

A. I can't recall, I probably did.

Q. Read the letter, may be the letter will recall the contents to you?

A. I can not recall that definitely.

Q. You can not recall this letter definitely?

A. No.

Q. Did you ever have any other sailing schedule printed other than this covering these shipments to Buenos Aires?

A. At that particular time, no.

Q. That is what I mean, that would cover that particular period. Do you remember this conversation you had with Mr. Benjamin of the Pacific Egg Producers——

Mr. GRAHAM: Just a moment; I object to any leading question here. This witness is their witness.

Mr. SAPIRO: Do you call that a leading question?

Mr. GRAHAM: You certainly are going to lead up to a leading question. I do not want any leading questions asked at all.

[Testimony of R. S. Wintemute.]

The COMMISSIONER: That would be objectionable on the ground [173] that there is no foundation laid.

Mr. SAPIRO: I am asking if he had a conversation.

Q. Did you have a conversation with him?

A. I did.

Q. When?

A. I could not accurately say whether it was in January or December or November of 1929 or 1930.

Q. Who was present?

A. There were three or four gentlemen present, Mr. Benjamin, and I believe Mr. McCurdy, and Mr. Lawler and a gentleman connected with the Washington Cooperative from Seattle.

Q. Was Mr. McKibben present?

A. I don't remember. It is pretty hard to recall all those who were present at that meeting.

Q. Did you have a later discussion with Mr. Lawler? A. Yes.

Q. When? A. Some time during March.

Q. Where did that take place?

A. I am not sure whether it was over the telephone. I might explain here that I had two or three conversations with the Pacific Egg Producers at various times after the particular booking had been made, either on the telephone or over at the office. I only recall seeing Mr. Lawler once and that was in connection with the talk that I had with Mr. Benjamin.

Q. You mean you only recall seeing Mr. Lawler with Mr. Benjamin at that time?

[Testimony of R. S. Wintemute.]

A. With Mr. Benjamin.

Q. Then you had another conversation with him that you can remember?

A. I believe I talked with him over the telephone.

Q. You say that was in the early part of March?

A. During March.

Q. When? A. After the booking had been made.

Q. When was that?

A. You mean when the booking was made?

Q. No, when was the conversation?

A. The conversation was in connection of the loading of that ship and the quantity of eggs they expected to supply.

Q. When was the conversation?

A. Some time during March. [174]

Q. About when? A. I can't recall the date.

Q. Was it after the first?

A. After the first of March.

Q. Was it before the 15th?

A. That I could not say.

Q. Was it after the 10th?

A. I could not say. It was some time after the booking was made.

Q. You think it was after the first of March but you don't know when, otherwise? A. No.

Q. This sailing schedule of 32 days as advertised to the trade generally, was that based on any past sailing schedule? A. Not necessarily.

Q. I am asking you was it? A. No.

Q. I notice as to the other two motor vessels, one of them takes 32 and one 35 days?

[Testimony of R. S. Wintemute.]

A. According to that sailing schedule.

Q. I might say for your information so that you will understand, the Pacific Egg Producers is referred to in the stipulation as the agent as to each of these libelant corporations, to act for them in some of these arrangements? A. Yes.

Q. Did you have any conversation with Mr. Van Bokkelen? A. Yes, I did.

Q. Did you agree with him as to the rate of this shipment? A. I did.

Q. You knew that he was to receive the eggs?

A. I assumed that he was.

Q. And you knew that the discussion with these people involved eggs? A. Yes.

Q. And the general destination of the eggs?

A. Their destination, yes.

Q. That rate was 70 cents? A. 70 cents a case.

Q. When was that agreed to with Mr. Van Bokkelen? A. About the first week in March.

Q. Had there been some previous discussion as to that rate? A. Not on that particular shipment. [175]

Q. That was the first time it was mentioned?

A. The first time it was mentioned.

Q. That was the first week in March? A. Yes.

Q. You had never given any rate previous to that conversation?

A. Not in connection with that particular shipment.

Q. In connection with any shipment?

Mr. GRAHAM: We object to that.

Mr. SAPIRO: Q. Didn't you have any discus-

[Testimony of R. S. Wintemute.]

sion in connection with this shipment, with these shipments that were to me made to the Argentine in the spring of 1930?

Mr. GRAHAM: I object to that. I think your Honor has already ruled on that three times.

The COMMISSIONER: I will sustain the objection.

Mr. SAPIRO: Q. Was that discussion with Mr. Benjamin and the others held after you had, or your organization had sent this letter of January 27, 1930, to the Pacific Egg Producers? A. I believe so.

Q. This schedule, the sailing schedule that you presented to the trade, shows that the period of time elapsing between Montevideo and Buenos Aires would be one day. Did you present any other sailing schedule showing any different stops at any of the ports concerned in this shipment? A. No.

Q. There was no other sailing schedule that was presented?

A. There was no other sailing schedule delivered.

Mr. SAPIRO: That is all.

Cross Examination.

Mr. GRAHAM: Q. Mr. Wintemute, is it customary to deliver sailing schedules to everybody who you think might ship cargo on your vessels indicating from day to day the dates of arrival and departure, and ports to which the vessel goes? [176]

Mr. SAPIRO: We will object to that as immaterial, irrelevant and incompetent. If he wants to

[Testimony of R. S. Wintemute.]
refer to a particular sailing schedule that was delivered, that is proper.

Mr. GRAHAM: I think it is very material for the very reason that your preceding question was directed to whether he delivered any other sailing schedule to these people——

Mr. SAPIRO: And I am arguing that it is immaterial——

Mr. GRAHAM: Just a minute, let me finish my statement, if you do not mind. I think it is immaterial if he did not deliver any schedule to any people. Mr. Sapiro asked him whether he did or not.

The COMMISSIONER: I will allow the question.

Mr. GRAHAM: Will you read the question?

(Last question repeated by the reporter.)

A. Just as a matter of information only.

Q. About how often in a year did you issue these sailing schedules? This one was issued in November 1929, and you have testified there was not another one issued until after the sailing of the vessel, which was in late March.

Mr. SAPIRO: He did not testify to that at all. He said there was no other.

Mr. GRAHAM: Will you read the question.

(Last question repeated by the reporter.)

A. It is very irregular, sometimes we might issue them once a month, and sometimes not for three or four months.

Q. I note on this sailing schedule issued No-

[Testimony of R. S. Wintemute.]

vember, 1929, that the vessel is scheduled at that time to call at Rio de Janeiro, Santos, Montevideo, Buenos Aires, Rosario and Santa Fe and other ports as inducements offer. What do you mean by that statement on the schedule?

A. We mean that sometimes cargo of sufficient quantity is offered at other ports and we reserve the right to accept that cargo. [177]

Mr. SAPIRO: We ask that the answer go out as calling for the conclusion of the witness.

Mr. GRAHAM: It is not any conclusion at all, it is a statement of what the witness does as traffic manager and vice president of this company.

The COMMISSIONER: Q. Are you the traffic manager?

A. I am vice president in charge of traffic.

Q. Would you be the one that would interpret what that schedule means? A. Yes.

Mr. SAPIRO: I don't know whether it needs an interpretation.

Mr. GRAHAM: I certainly think if anybody could tell what "other ports as inducements offer" means, this is the witness that can do it.

The COMMISSIONER: I will allow the answer to stand.

Mr. GRAHAM: Q. Are the ports of Bahia and Pernambuco among other ports which would be fairly described by this language in your schedule?

A. Yes.

Mr. SAPIRO: We will object to that as being immaterial, irrelevant and incompetent and calling

[Testimony of R. S. Wintemute.]

for the conclusion of the witness on a matter that the court is called upon to determine.

Mr. GRAHAM: It seems to me it is quite material by reason of the fact that in answer to an interrogatory the libelant stated that the vessel called at the ports of Pernambuco and Bahia contrary to agreement, and an examination of the map which I presented this morning will show that both of those ports are on the route from the Canal to Buenos Aires.

The COMMISSIONER: Subject to your motion to strike out, I will allow the answer to stand.

Mr. GRAHAM: Q. Do you know who Mr. Benjamin is? A. I know of him. [178]

Q. Do you know by whom he is employed?

A. I believe it is the Pacific Egg Producers.

Mr. SAPIRO: Do you want me to tell you?

Mr. GRAHAM: No.

Mr. SAPIRO: We will be glad to stipulate on that.

Mr. GRAHAM: I don't want to know. I wondered if Mr. Wintemute knew.

Q. These conferences that you had with Mr. Lawler and Mr. Benjamin and Mr. McCurdy in January 1930, about which you have testified, will you tell me what the conversations concerned?

A. The conversation concerned the possibility of their making some shipments of eggs from the Pacific Coast to Buenos Aires. They were mostly concerned about the freight rates.

Q. They were just general conversations having

[Testimony of R. S. Wintemute.]

to do with obtaining business and shipping eggs to South America by your vessels? A. Yes.

Mr. SAPIRO: We will object to that as immaterial, irrelevant and incompetent, and an improper characterization of the nature of the conversations; the conversations stand on their own footing as to what they are.

Mr. GRAHAM: I think that is a proper question and I think the answer is proper. He was asked on direct examination about what conversations he had, and now I am asking on cross examination what the nature of the conversation was.

Mr. SAPIRO: He can not state what the nature of it is. If you want to make him your own witness for the purpose of bringing out the subject matter of the conversation I am perfectly willing for you to do it. We did not go into the subject matter of any conversation. We found out that certain conversations had occurred. He did not characterize their general nature. That is not the way to prove a conversation.

Mr. GRAHAM: I think the witness is entitled to tell about a conversation that he had, about which he was asked on direct [179] examination.

Mr. SAPIRO: Not on cross examination.

Mr. GRAHAM: I will submit it.

The COMMISSIONER: I think he is entitled to ask him what the nature of the conversation was. You established that he had certain conversations. Now he can ask what the nature of it was.

Mr. SAPIRO: He asked him that, and then in

[Testimony of R. S. Wintemute.]

addition he wants to go farther and characterize it himself, and he says the conversations were so and so. He can't do that.

The COMMISSIONER: No, that is correct.

Mr. GRAHAM: I think I can ask the witness in a leading question the character of the conversation he had. The witness answered that question that I asked him. I think it is both a proper question and a proper answer. The witness is not my witness. He is libelant's witness. I have him on cross examination.

Mr. SAPIRO: Not on the subject matter of any conversation.

The COMMISSIONER: As I understand, Mr. Sapiro, he asked him what was the nature of the conversation.

Mr. SAPIRO: And the witness answered, and he wants to characterize it further. He can not do that.

The COMMISSIONER: I will sustain the objection.

Mr. SAPIRO: I will ask that the answer go out. He answered before I got in my objection.

Mr. GRAHAM: I think I am entitled to ask that question as proper cross examination.

The COMMISSIONER: Yes, I think he is. I think that is allowable.

Mr. SAPIRO: On direct examination we did not go into the subject matter of his conversation. We did not propose to be bound by this witness on the subject matter of the conversation, and we did not

[Testimony of R. S. Wintemute.]

ask him a word about it. We found out there were certain [180] conversations. Now on cross examination he is only allowed to go into the field covered on direct examination.

The COMMISSIONER: That is true.

Mr. SAPIRO: If he wants to cross examine him as to whether or not there were different conversations——

The COMMISSIONER: You mean the nature of the conversations?

Mr. SAPIRO: No, not the nature of the conversation. We did not ask him the nature of the conversation in any respect. This is improper cross examination. I do not object if you want to be bound by his testimony, to go into that subject matter, I am not objecting to the order in which the thing is put in, but when he tries to make a statement as he does, that he is examining our witness and binding us by his cross examination, then I will have to object, because that statement is highly improper.

The COMMISSIONER: It will go in with that understanding then.

Mr. GRAHAM: Q. Mr. Wintemute, at that time, in January, were there any bookings, or had any bookings been made of any cargo by the Pacific Egg Producers Company? A. No.

Q. These conversations that you had about which Mr. Sapiro objects to your testifying,——

Mr. SAPIRO: I object to any such characterization. I will give you my opinion of a smart aleck remark in a minute.

[Testimony of R. S. Wintemute.]

Mr. GRAHAM: Q. Mr. Wintemute, did any of these conversations which you had with Mr. Benjamin result in the booking of any cargo by you for Pacific Egg Producers for shipment on your vessel at that time, and particularly the "Hindanger"?

A. No.

Mr. SAPIRO: We will object to that as calling for the conclusion of the witness.

Mr. GRAHAM: This witness is traffic manager and vice president in charge of the traffic of the General Steamship Corporation and I asked him whether the conversation at that time resulted in [181] any contract for the carriage of eggs and he said no. If there is any conclusion in that, I will leave it to your Honor.

The COMMISSIONER: I think that is proper; I will allow it.

Mr. GRAHAM: I think that is all at this time.

B. F. McKIBBEN

called for the libelant, sworn:

Mr. GRAHAM: May it be understood that there is an objection on our part to the introduction of any and all testimony of an extraneous nature, and that my cross examination of this witness shall not be deemed to be a waiver of that objection.

Mr. SAPIRO: That may be stipulated.

The COMMISSIONER: And it may be subject

(Testimony of B. F. McKibben.)

to your motion to strike.

Mr. SAPIRO: That is understood. It will be stipulated that that will apply to every witness called, so that he does not have to repeat his objection.

The COMMISSIONER: All right.

Mr. SAPIRO: Q. Where do you reside?

A. Oakland, California.

Q. What is your official position?

A. I am executive secretary of the Pacific States Butter, Egg, Cheese and Poultry Association.

Q. Do you know Mr. Earl Benjamin, general manager of the Pacific Egg Producers?

A. Very well indeed.

Q. You knew him in 1930? A. I did.

Q. Did you go with him to a conference held with Mr. Wintemute of the General Steamship Corporation? A. I did, yes.

Q. Where was that conference held?

A. That conference was in Mr. Wintemute's office.

Q. About what time?

A. To the best of my belief that conference was on Saturday, February 15. I will tell you how I arrive at that conclusion. I know it was early in February, the fore part [182] of February. The annual meeting of my association was held in Portland, Oregon on February 10 to 12. I find in my files a letter which I wrote to Mr. Sanders, of the Washington Cooperative Association prior to that meeting, indicating that Mr. Benjamin would be at

(Testimony of B. F. McKibben.)

our meeting and would come south at or about the same time that I did, following our convention, and I suggested to Mr. Sanders that he try to come at the same time, as both Mr. Benjamin and Mr. Sanders expected to attend the annual meeting of the Pacific Egg Producers to be held in Los Angeles following our convention, in fact the following Monday.

Mr. GRAHAM: I move that all of the answer be stricken out as not only not responsive to the question, but immaterial. It seems to me the only part that is pertinent is that he was at this meeting at that time.

The COMMISSIONER: That will go out.

A. I might explain I am trying to state how I arrived at my conclusion as to the exact date.

Q. Your best recollection is that it was some time in February?

A. About the middle of February. My recollection is, it was Saturday, February 15.

Q. What year? A. 1930.

Mr. SAPIRO: Q. Who was present, do you remember, at that conference?

A. Mr. Benjamin, Mr. Rother, my recollection is, Mr. Sanders of the Washington Cooperative, Mr. Wintemute, I believe Captain Petersen and possibly one other representative of the steamship company, besides myself.

Q. What was your subject matter of discussion?

A. The subject matter of discussion was, it involved, I would say, about four phases of movement

(Testimony of B. F. McKibben.)

of eggs to Buenos Aires; one was the development of markets in that territory for Pacific Coast eggs.

Mr. GRAHAM: Just one moment; I object to this as going over [183] a general field of discussion, what he may have had in mind in connection with this subject at that or any other time. We are concerned here with the suit against this company for an alleged delay and deviation on the steamship "Hindanger", and I think this witness' testimony should be confined to testimony relative to that shipment. I think the witness should be limited to that, and I move to strike any part of his testimony heretofore given, which does not refer to that.

The COMMISSIONER: Can you tie it in later on?

Mr. SAPIRO: Yes.

The COMMISSIONER: I will let it go in subject to that understanding.

Mr. SAPIRO: I might state that this agreement did not result from just two parties getting together on one day and completing all details, but that the whole circumstances in reference to the situation and in reference to getting transportation and timely transportation was developed in a series of conversations.

The COMMISSIONER: Do you mean as to the carriage of eggs on the "Hindanger"?

Mr. SAPIRO: Yes. It arose out of it; this was the beginning of it.

A. The second phase of the discussion related to the rate, or the transportation cost; the third phase

(Testimony of B. F. McKibben.)

related to the time, the transit time between this port and Buenos Aires, and the fourth phase related to the question of safe storage both as to temperatures and preventing contamination from other freight.

Q. What was said in the course of that conversation as to the time of the voyages?

Mr. GRAHAM: Just a minute; I object to any answer which will have to do with anything except the motorship "Hindanger", with which alone we are concerned in this litigation; any statements made or any discussions had in connection with the shipment of [184] eggs in general as contemplated by Mr. Sapiro's question is immaterial.

The COMMISSIONER: Will you tie that in with this voyage?

Mr. SAPIRO: Yes. We would like at this time to introduce a letter which was in the possession of the agent of the plaintiff.

The COMMISSIONER: Have you seen that letter?

Mr. GRAHAM: Yes.

Mr. SAPIRO: It is dated January 27, 1930, and refers specifically to the motorship "Hindanger" and the time of this voyage.

Mr. GRAHAM: Do I understand that this letter is offered in evidence as intending to be a part of the alleged or purported contract for the carriage of the "Hindanger" eggs?

Mr. SAPIRO: This letter is introduced as part of the information and understanding conveyed to

(Testimony of B. F. McKibben.)

the libelant by the respondents.

Mr. GRAHAM: I think I am entitled to an answer to that question, because I believe that this letter is objectionable. It does not purport to be a letter having to do with the shipment which moved on the "Hindanger", and I do not think it refers to the shipment on the "Hindanger" at all.

Mr. SAPIRO: I want your Honor to read the letter and see how relevant that statement of counsel is; it is about as relevant as his statement of the law.

The COMMISSIONER: Your objection is what?

Mr. GRAHAM: I asked counsel for the libelant if it was intended to introduce this letter as having to do with the purported contract for the carriage of these eggs. I think I am entitled to know the purpose of the introduction of the letter.

Mr. SAPIRO: If I did not think it had something to do with it I would not introduce it.

The COMMISSIONER: You object to this on the ground that it is what? [185]

Mr. GRAHAM: I object to it on the ground it has not anything to do with the shipment which moved on the "Hindanger". In the first place, if your Honor will note the first paragraph there, "Referring to correspondence already exchanged and recent conversations, regarding option granted you for shipment of eggs to the Argentine during March, April and May, we now find that it will be necessary to alter our schedule due to unavoidable delays experienced by our vessels at South American

(Testimony of B. F. McKibben.)

ports." I shall be able to establish hereafter that this option was never taken up, that it forms no part of the contract for the carriage of these eggs in question has no bearing in this case whatsoever.

Mr. SAPIRO: That is their defense, if they want to establish that.

Mr. GRAHAM: I object to its admissibility at this time for any purpose; it is not shown to have been any part of the contract at all; it is merely a letter which was written to the Pacific Egg Producers and has no bearing on this contract whatsoever.

The COMMISSIONER: I can not see how this is material, Mr. Sapiro.

Mr. GRAHAM: Mr. Sapiro might be able to find a whole lot of other letters which were written to the Pacific Egg Producers.

Mr. SAPIRO: The Pacific Egg Producers was the agent in this case. Here is the party that is trying to negotiate for the shipment, and they write them a letter and state that they will offer space for eggs on a boat that will sail from San Francisco the 24th of March, arriving at Buenos Aires on or about April 28th, and then it goes on to give their shipping time as 32 to 35 days. Suppose we had no other information from them, and relied on that, we are certainly entitled to rely on the information that they wrote as to their boats. Apparently, from Mr. Graham's conception as to the law, a ship is not bound by any contract it makes, [186] that it can practice any type of fraud upon the public or

(Testimony of B. F. McKibben.)

upon the shipper, go ahead and send a man any kind of a letter as to the time and everything else, and it is immaterial, he says.

The COMMISSIONER: What is the date of that letter?

Mr. SAPIRO: January 27, 1930, and it refers to the very voyage upon which these eggs went out. After all, a contract is made by a series of negotiations. The mere fact of their just first offering, or that their first negotiations are in this form and are later filled out so that they cover more, makes no difference.

The COMMISSIONER: That is your contention, that it was a series of negotiations?

Mr. SAPIRO: Yes, and this was one of the steps.

The COMMISSIONER: Mr. Graham's objection is that these negotiations were merged in the bill of lading.

Mr. SAPIRO: We have the cases that will show your Honor, when you get the time to read the memorandum, that an oral contract is a binding contract and does not merge into a bill of lading.

The COMMISSIONER: That is a question for me to decide later on.

Mr. SAPIRO: Yes; I do not want to argue that, because that is a question that is going to be submitted to you.

The COMMISSIONER: I just wanted to get your ideas.

Mr. SAPIRO: That it was a series of negotia-

(Testimony of B. F. McKibben.)

tions which culminated in an oral contract.

The COMMISSIONER: And your contention, Mr. Graham, is that it was merged into the bill of lading?

Mr. GRAHAM: No, my contention is more than that. My contention is that this particular document here, being a letter written on January 27, has not got anything to do with this shipment. This letter says, in the very first paragraph: "Referring to [187] correspondence already exchanged and recent conversations, regarding option granted you for shipment of eggs on the 'Hindanger' and some other ships". Now it has not been shown by this witness and it can not be shown by any witness, we submit, that this option was ever exercised, that the eggs were ever shipped by reason of this letter at all. We submit that any letter having to do with options which were granted to these parties or to any other parties are immaterial evidence in this case, have nothing whatsoever to do with either the contract, the purported oral contract or the background for any purported oral contract. This is just immaterial evidence. If counsel saw fit he might be able to produce a dozen letters which were written to the Pacific Egg Producers over a period of time, some prior or some subsequent to this date, giving options. It is customary, as your Honor well knows in the steamship business, for shippers to take options for shipment of cargoes and for vessel owners and operators to give options for shipment of cargoes. If it could be successfully maintained

(Testimony of B. F. McKibben.)

that these letters granting options which thereafter expired and were never exercised became a part of any contract which was thereafter entered into, having to do with some other shipment, the field of admissibility of evidence is opened up to an extent which I am satisfied is not the fact.

The COMMISSIONER: I think it is immaterial, Mr. Sapiro. It is a general letter of information. I will let it go in and you can move to strike it out.

Mr. GRAHAM: I hate to insist, I do not want to insist on this, but I do not think that this kind of letter has any point in this case, and although I appreciate your Honor's problem, still I think there is a line beyond which evidence should not be admitted at all, and I think that these letters have got no part in this case; they state right on their face they are an option. [188]

Mr. SAPIRO: They certainly do not, they state just the opposite.

Mr. GRAHAM: If you read the first paragraph of the letter of January 27, 1930, you will note that it says: "Referring to correspondence already exchanged and recent conversations regarding option granted you for shipments of eggs". Now that option was never exercised. The eggs were never shipped under that option and it thereafter expired. I submit that has not got anything to do with this case.

Mr. SAPIRO: It says "We now find that it will be necessary to alter our schedule." Now based upon

(Testimony of B. F. McKibben.)

the information contained in this letter, a series of negotiations were undertaken, with this as the beginning, resulting in the shipment of this very ship "Hindanger" which they call to their attention in this letter, of these eggs which went on this particular voyage, although the voyage did not start as scheduled there. But this is the same voyage which it outlined, and which this witness testified was the same voyage that the "Hindanger" made which is the subject-matter of this controversy.

The COMMISSIONER: There might have been several of these letters passed back and forth. How do they relate to the particular voyage?

Mr. GRAHAM: They do not.

Mr. SAPIRO: Because it refers to the steamer "Hindanger" and the date, March 24; it left, as a matter of fact, in April, but it is the same voyage.

Mr. GRAHAM: They do not refer in any statement to the cargo which actually was shipped either by these libelants or by them acting as agents.

The COMMISSIONER: I think it is immaterial.

Mr. GRAHAM: We could submit all sorts of letters if [189] permitted to. I would like you to produce any letters in reference to this shipment.

Mr. SAPIRO: If we can not introduce letters referring to a particular shipment, I don't know what you can produce in court.

The COMMISSIONER: You can not introduce a letter not having a thing to do with the contract.

Mr. SAPIRO: Your Honor, there are positive

(Testimony of B. F. McKibben.)

statements, there are admissions——

The COMMISSIONER: I think the quickest way to determine this is to let it go in subject to the same motion to strike out. I can not see that it is material but I will allow it to go in for the purpose of saving time.

(The letter of January 27, 1930, is marked "Libelants' Exhibit 2.")

Mr. SAPIRO. Do you want this read?

The COMMISSIONER: No, it may be deemed read.

Mr. SAPIRO. Q. Mr. McKibben, you say that in this conference when Mr. Benjamin was present, there was a discussion of the transit time? A. Yes.

Q. Was there a discussion of the steamer that would be available? A. Yes.

Q. What was said?

A. Well, Mr. Wintemute simply gave us a list of the various steamers that were scheduled to sail, showing their dates of sailing and the approximate time of each and other related information in connection with it.

Q. Do you remember whether you had this schedule?

A. No, I could not say. It was my impression that he gave us that information from their own official records.

Q. Was the steamer "Hindanger" discussed?

A. I remember that the steamer "Hindanger" particularly was mentioned, the name struck me at the time, I was not familiar with the "Hindanger",

(Testimony of B. F. McKibben.)

it was [190] rather a peculiar name and it stayed with me.

Q. Was there any discussion as to the time it would take, as to the schedule time, from San Francisco or Seattle?

A. It is my recollection that it was stated the time was somewhere between 30 and 35 days.

Q. From where?

A. From San Francisco to Buenos Aires.

Q. At that conversation was there anything said between the parties in reference to market conditions in the Argentine, with respect to the time of the shipment?

Mr. GRAHAM: Just a minute; we are not interested in the market conditions in this case whatsoever. It is elemental, I believe, that vessel owners are not liable for loss of market. We are interested in this case as to whether there was a deviation or a delay.

The COMMISSIONER: I think that is true. I will sustain the objection.

Mr. SAPIRO: You said there was a discussion at this conference, Mr. McKibben, as to the marketing facilities, I believe? What was that discussion?

Mr. GRAHAM: We are not interested, your Honor, in the marketing facilities either. We are interested in this shipment on the "Hindanger". Your Honor has let this evidence in on the theory that it would be tied in later with the "Hindanger", and I submit it is not tied in, and we are not interested in a discussion of the general nature of

(Testimony of B. F. McKibben.)

market conditions relative to this case or any other case.

Mr. SAPIRO: I want to state the purpose of this evidence is to prove that the General Steamship Corporation was informed that the market for eggs in the Argentine was seasonable, that it was therefore necessary to have exact information concerning the sailing time, both the time of leaving and the length of the [191] sailing schedule, that they did discuss the seasonable nature of the Argentine market for Pacific Coast eggs, and it was made known to the General Steamship Corporation. I might state that in the Walton Moore Dry Goods Company vs. Pacific Mail Steamship Company, reported in 1925 A. M. C. 1261—I am reading the head note—Judge Kerrigan held that where a carrier agrees to reserve space for certain goods on a certain vessel, knowing the goods to be seasonable, and of the shippers' desire for delivery before an apprehended break of the market, and fails so to reserve space, it is liable for the difference in the market price at destination at the time when the goods would have arrived on the agreed vessel and the time when they actually arrived, less freight." That shows that the seasonable nature is a factor which we are entitled to have called to the attention of this court because that factor was also evidently in the minds of these parties when they negotiated for a shipment that was to go at a specific time and on a boat that was making a specific schedule.

The COMMISSIONER: That may be true, but

(Testimony of B. F. McKibben.)

it out when the shipments will leave here and when they will arrive, so that they will get there within the seasonable period, so as not to break the market. That is why they were discussing at that time the boats that were sailing as Mr. McKibben testified—they were discussing the boats that were sailing including the "Hindanger" and they were discussing the sailing time. Those were all factors involved in that.

Mr. GRAHAM: Might I say I do not believe that decision holds any such thing as it is stated to hold.

Mr. SAPIRO: I read the head note, and if you do not think I read it correctly you can read it.

Mr. GRAHAM: In this case here, your Honor, if I may just read a part of the decision—it is only a page long.

"On or about the 22nd day of May, 1920, the libelant and the Pacific Mail Steamship Company entered into a special verbal agreement of affreightment under the terms of which space was reserved for approximately 120 tons of merchandise on board the S. S. 'Ecuador' from Shanghai to San Francisco. Through an error of the agents and representatives of the steamship company such space was cancelled without notice to the libelant. Thereupon the steamship company arranged with the libelant that it would [194] cause such merchandise to be transported on the S. S. 'Archer' which, the company represented, would leave Shanghai two or three days after the 'Ecuador' and would arrive in

Testimony of R. F. McElroy.

San Francisco was like that a year after that vessel. This representative was selected made and was entitled to write the "Eureka" received pay on the "Ida," the "Lurline" did not arrive in San Francisco until September 2nd following.

"It also appears from the evidence that the merchandise in question was what is called 'seasonable' goods, and the question arose was informed and understood that it was the usual habit of the shippers to get the merchandise to San Francisco as soon as possible, not only in time for the winter trade, but also in time to take advantage of the high market prices then prevailing in San Francisco, and which the Orient would soon become. The apprehended break in the market occurred coming between the date of the arrival of the "Eureka" and that of the "Lurline."

There is no question but that there is a distinction between the case I cited and the decision of Judge Kerrigan. It is endeavored to have this witness testify as to general market conditions. There has been no question asked this witness whatsoever as to market conditions prevailing in the Argentine. If he knew them, upon the date of arrival of the scheduled date of arrival of the "Himalayas". He is being asked a general question as to market conditions in the Argentine, and I submit that his testimony is inadmissible, and it is not established to be admissible by that decision.

(Testimony of B. F. McKibben.)

Mr. SAPIRO: The decision says the evidence shows that the merchandise in question was what is called seasonable goods, and the steamship company was informed and understood that it was the urgent desire of the shipper to get the merchandise to San Francisco as soon as possible, not only in time for the winter [195] trade, but also in time to take advantage of the high market prices then prevailing in San Francisco. The testimony we say is exactly the same.

The COMMISSIONER: If you are referring to the general discussion of market conditions, I can not see how that is material.

Mr. SAPIRO: We are referring to the conversation where they discussed with these people the possibility of making arrangements for the shipment of goods. Now they were told at that conversation as has been testified, concerning the boats that were available and the possible dates of sailing, and the scheduled transit time.

The COMMISSIONER: What were they told about the "Hindanger"? We have not had any testimony about that.

Mr. SAPIRO: They were told from 32 to 35 days.

Mr. SAPIRO: Q. Was there any discussion as to when it would possibly leave?

A. I am testifying on that point merely from memory, and the date was March 23 or thereabouts.

Q. Somewhere around March 23?

A. I don't know the fact as to when it did sail

(Testimony of B. F. McKibben.)

or exactly what the schedule did say, but that is the date that is in my mind, on or about March 23.

Mr. GRAHAM: Q. That is from Seattle?

A. From here. That is a matter of recollection, as I say.

Mr. SAPIRO: Q. Mr. McKibben, there was only one conversation that you attended down there, was there not, where Mr. Benjamin was present with Mr. Wintemute?

A. That is the only conversation I recall when Mr. Benjamin was present and Mr. Sanders, that is the one that Mr. Wintemute mentioned a while ago.

Q. And Mr. Sanders is the president and general manager of the Washington Association, one of the libelants in one of the cases?

A. He is president and manager of the Washington Cooperative. I am not familiar with as to whether or not he is one of the [196] libelants.

Q. The fact is, it is. At that conference was there any discussion concerning—I believe you said there was discussion concerning the seasonable character of the Argentine egg market? A. There was.

Q. What was said?

Mr. GRAHAM: Just a moment, we have objected to that three or four times and I do not think counsel should be continually repeating it after it has been objected to.

The COMMISSIONER: I think it is immaterial. I do not see how that would bind the steamship company if you had a conversation like that. I think I could take judicial notice that the egg market in

(Testimony of B. F. McKibben.)

any place was seasonable and was so in the Argentine.

Mr. SAPIRO: If your Honor will take judicial notice of the fact and will also take judicial notice that shipments coming in at a certain time would break the market, we will be satisfied not to ask the witness that question.

Mr. GRAHAM: No, I don't think he could take judicial notice of that.

The COMMISSIONER: What you are trying to do, I assume is—You would have to prove a conversation relative to this particular shipment.

Mr. SAPIRO: He was just talking of the "Hindanger" shipment and that was a shipment to leave around March 23rd.

The COMMISSIONER: Maybe I can expedite the matter. What was said relative to the shipment made on the "Hindanger"?

A. That was the traffic that was under discussion at that time, this traffic which eventually did move on the "Hindanger", and the "Hindanger" was one of the boats considered in the discussion as a likely boat for the movement.

Q. What was said relative to the "Hindanger" particularly about [197] the movement of eggs?

A. The time schedules were considered, the transit time, the probable date of sailing and the availability of that boat as compared with the other boats for delivery during the seasonable period desired in this particular case.

Q. What was the probable date of sailing?

A. As I said a moment ago, I am testifying from memory, it was on or about March 23.

(Testimony of B. F. McKibben.)

Mr. GRAHAM: I think if I might ask a question or two I might clear this thing up.

The COMMISSIONER: Go ahead.

Mr. GRAHAM: Q. As I understand you, this was a general discussion having to do with several subjects, time of transit, rates, stowage on the vessel?

A. Those several subjects all centered upon this one question of this movement of the particular traffic in question.

Q. That is the movement of eggs to the Argentine on vessels of the Westfal Larsen line?

A. That is true.

Q. That is what you had in mind?

A. That is true.

Q. Now you also discussed the availability of egg supply I suppose, did you not? A. Yes.

Q. In other words, you covered the whole field in the general discussion of the subject, having in mind that you wanted to ship the eggs to Buenos Aires, and the steamship company wanted to carry the eggs to Buenos Aires, and you had in mind these ships that were named?

A. Certainly, that was related to the question of the rates and the availability of the boats for getting the eggs to the market.

Q. You never had shipped any eggs down to Buenos Aires before, had you, or had you—I don't know?

A. Well, understand, I am not connected with the Pacific Egg Producers, but to the best of my recollection, they had, but I could not positively testify.

(Testimony of B. F. McKibben.)

Q. These discussions were merely discussions in your presence [198] in which you were a listener?

A. In which I was partly a listener and participated to some extent.

Q. You and Mr. Benjamin and Mr. Sanders and others who were there went into Mr. Wintemute's office for the purpose of developing this new business to the Argentine in which you were all interested? That was the purpose of the visit and the general nature of the discussion?

A. Naturally it was the question of developing the possibility of moving this particular traffic for which they were negotiating at that time.

Q. By "Particular traffic" you mean the shipment of eggs to the Argentine?

A. Yes, this particular movement.

Q. What particular movement had you in mind at that time? Isn't it a fact that you did not have any particular movement in mind? You were not representing any of the egg suppliers at that time, were you? A. No, it was not my traffic.

Mr. GRAHAM: That is all.

Mr. SAPIRO: Q. But you were familiar with the particular movement that was in mind were you not?

A. I was familiar with it and had discussed the matter with Mr. Benjamin. Might I explain this, that both of the shippers, the Washington Cooperative Egg and Poultry Association and the Poultry Producers of Central California operating through the Pacific Egg Producers, are members of my asso-

(Testimony of B. F. McKibben.)

ciation; therefore they call upon me for my cooperation in matters of this sort, particularly transportation matters.

Q. And the particular shipments at that time in mind were what?

A. The particular shipments in mind at that time——

Mr. GRAHAM: He has already answered that the particular shipments were eggs to the Argentine.

Mr. SAPIRO: He has not.

Mr. GRAHAM: He just testified to that.

Mr. SAPIRO: Q. What were they? [199]

A. They were eggs that eventually moved on the "Hindanger".

Mr. GRAHAM: Might I ask one more question there. Your statement is that the discussion related to eggs which moved on the "Hindanger". Did you have anything to do yourself with those goods which in fact moved on the "Hindanger"?

A. In an advisory way, yes.

Q. You don't know what eggs moved on the "Hindanger" thereafter. You knew that eggs did move on the "Hindanger" but that is all you know?

A. I know that eggs moved on the "Hindanger". Of course I had nothing to do with the packing or loading of those eggs, but those were the eggs under negotiation.

Q. Now remembering this, that in January 1930 you were talking about eggs which were going to move, you had no particular reference to any specific eggs which were thereafter going to move on

(Testimony of B. F. McKibben.)

the "Hindanger" or any other ship? You had the same sort of conversation you would have if you were shipping lumber or some other commodity to some port—that was the general nature of your discussion but it was not limited to any discussion as to a particular movement on any of those ships at any time?

A. I had no discussion in January.

Q. When did you have the discussion?

A. As I have testified, in February, on about February 15.

Q. These discussions in February were limited to a discussion of a general nature for the movement of eggs and had nothing whatsoever to do with the specific eggs which thereafter moved on the "Hindanger"; isn't that a fact?

A. It included both of those questions, the general movement of eggs, with a view to developing that business for the producers and a rate which would make that possible, together with a particular movement then in mind to be moved on the earliest available sailing, and which eventually did move in fact on the "Hindanger".

Q. Do you know how many eggs you were talking about moving on the [200] "Hindanger"?

A. It is my recollection that somewhere from ten thousand to fifteen thousand cases.

Q. That is a range of five thousand more or less. Did you know from what particular areas those eggs were going to come, except generally speaking they

(Testimony of B. F. McKibben.)

were going to come from the area which supplied eggs normally?

A. The area of the Pacific Egg Producers which includes the entire, or did include, at that time, Washington, California, and which now includes Oregon.

Mr. SAPIRO: Q. In discussing the matter of this shipment, this proposed shipment on this steamer that was going to leave March 23, was anything said as to the need of having it arrive within a certain marketing period? A. Yes.

Mr. GRAHAM: You are referring now to the "Hindanger" shipment?

Mr. SAPIRO: Yes. Q. What was said?

A. It was pointed out by Mr. Benjamin that owing to the seasonable condition of the market down there, the goods should be delivered, as I recall, on or about May 1 or very shortly thereafter.

Q. And was the quantity that was being shipped considered in connection with any statement as to when these eggs should arrive?

A. As far as I know, the quantity was not definitely determined at that time.

Q. Not in that sense, but was was there any consideration given to the fact that a proposed quantity ranging from ten thousand to fifteen thousands cases would have to arrive at a certain time for the market? A. I can not recall that.

Q. The matter of rates was discussed and not agreed upon at that time? A. That is correct.

Mr. SAPIRO: That is all.

(Testimony of B. F. McKibben.)

Cross Examination

Mr. GRAHAM: Q. You do not make any contention, do you, Mr. [201] McKibben, that any agreements were reached at that meeting at all? You merely had general discussion in which each of you expressed yourself as having in mind what you all wanted to do to develop this new business and how to ship them, or some ship to carry them?

A. There was no definite agreement at that time. The question of rates was left to be determined later.

Q. All other questions having to do with the shipment were also left in abeyance? A. Yes.

Q. In the general discussion which you had?

A. Yes.

Q. You only attended this one conference with the steamship representatives?

A. I discussed the subject on subsequent occasions principally by telephone. I telephoned Mr. Wintemute on one or two occasions.

Q. Those discussions were also of a general nature, having in mind the same mutual desire to build up the business?

A. Yes, and relative to the traffic then in mind.

Q. In connection with this seasonable feature of the Argentine market which you testified that you discussed, will you tell me exactly what the conversation was that you had relative to the seasonable feature of the delivery of eggs in the Argentine?

A. As I said before, that was a discussion principally between Mr. Benjamin and Mr. Wintemute, and it was based upon the fact that——

Q. (Interrupting) Just what did you tell Mr.

(Testimony of B. F. McKibben.)

Wintemute; never mind what it was based on. Just what did you tell Mr. Wintemute?

A. First, with respect to Pacific Coast eggs, our flush season comes along during the early spring. We had to take advantage of the seasonable prices here in order to be able to compete with eggs from the east coast of the United States, and from Holland, in the Argentines, and that both the question of rates and time in transit was necessary, and that the seasonable market for the Pacific Coast eggs in the Argentine was during that particular period up to [202] and perhaps not entirely through May.

Q. That is shipments from the Pacific Coast to and possibly through May? A. Yes.

Q. That would take care of your seasonable output from the Pacific Coast. A. Yes.

Q. Now what was the nature of the conversation having to do with the seasonable features of the traffic in the Argentines?

Mr. SAPIRO: I think you have got that in error. Do you mean that the shipments would leave here in May by your last statement?

Mr. GRAHAM: The witness has already testified to that. I think the witness is intelligent.

A. You spoke particularly about Argentine.

Mr. Graham: Will you read the question?

Mr. SAPIRO: I think counsel is trying to confuse you.

Mr. GRAHAM: I object to any such characterization.

(Testimony of B. F. McKibben.)

Mr. SAPIRO: I think that it is very clear your statement is trying to take advantage of an obvious situation.

Mr. GRAHAM: Will you read the question and the witness' answer?

(The record was read by the reporter.)

The COMMISSIONER: You understand that question, don't you?

A. My understanding of the question related particularly to the Argentine market, not the point of shipment from the Pacific Coast.

Mr. GRAHAM: Q. The question I asked you had to do with the seasonable price feature of the shipment of eggs from the Pacific Coast, and my understanding of your answer is that those shipments should move from the Pacific Coast through May, or could move through May to take advantage of the seasonable price feature from the Pacific Coast.

A. Your understanding is incorrect.

Q. Will you kindly tell me what the seasonable feature of the trade to the Argentine is? What was the discussion you had [203] with Mr. Wintemute on the seasonable feature of the trade to the Argentine, having to do with shipments from the Pacific Coast?

A. That in order to take advantage of the Argentine market, shipments would have to be delivered early in May. The seasonable feature as related to the Pacific Coast, as I explained to you in the first instance, was the low prices beginning, say during March.

(Testimony of B. F. McKibben.)

Mr. SAPIRO: When you say "delivered in May", what do you mean?

A. I mean delivered at the market.

Q. Where? A. In the Argentines.

Mr. GRAHAM: And the shipments would run during March, or how long from the Pacific Coast, having in mind the seasonable feature of the business?

A. Having in mind the seasonable feature of the business here, as far as price situation was concerned, I think that is what you refer to, that varies somewhat by season, but ordinarily the price would break here to a low point, say during the latter part of February and through March and possibly on through April or part of April, and then would start an upward rise.

Q. In other words, part of February, March and part of April would take care of the price feature or seasonable feature on the Pacific Coast?

A. Ordinarily. 1931 was an exception.

Q. Do you know whether any other shipments of eggs were made to the Argentine during this time except on the "Hindanger"?

A. No, I do not.

Q. You are not familiar with any other shipment except on the "Hindanger"?

A. That is all. It is my understanding, if you will accept that, that certain other shipments were made.

Q. You are not familiar with them?

A. I am not familiar with them.

(Testimony of B. F. McKibben.)

Q. How is it you are so familiar with this shipment on the "Hindanger" and you are not familiar with other shipments which were made?

A. Because that was the particular point of discussion and as stated I had some subsequent discussion not only with Mr. Wintemute, but [204] representatives of the McCormick Steamship Company and with the shipper, Mr. Lawler.

Q. Now the conversation that you had with the McCormick Steamship Company would not of course refer to the "Hindanger"?

A. Naturally not. That related to rates.

Q. This conversation with them would not bring back to your memory any shipment on the "Hindanger," would it? A. Naturally not.

Q. Do you remember the names of the other ships that were under discussion with Mr. Wintemute when you discussed this in February?

A. No, I do not.

Q. You remember the "Hindanger" particularly because it is the peculiarity in name, I think you testified?

A. Because of the peculiarity of the name and because of the fact that under the later discussion it was particularly brought to mind.

Q. Do you know whether any shipments were made on the "Villanger" or on the "Brimanger"?

A. I do not.

Q. Does reference to those names recall anything to you? A. No.

(Testimony of B. F. McKibben.)

Q. Do you know whether these ships were under discussion at all, with Mr. Wintemute?

A. I don't know.

Q. Do you know whether the "Villanger" or the "Leikanger" were in discussion with Mr. Wintemute?

A. What is the first one?

Q. The "Villanger"?

A. That might have been mentioned, I could not say. In other words, they took the schedules of sailings during that particular period, and if any of those boats were on there and made relative time, they were probably discussed.

Q. And your recollection of the "Hindanger" as you now recall it, was the result of your recent discussion of the "Hindanger" shipment rather than from any other cause? A. Not at all.

Q. All right. You have no recollection of any discussion as to possible shipment on the "Villanger" or "Brimanger"?

A. If there were any shipments made on those boats I had nothing to do with them. [205]

Q. Did you have any more to do with the shipment on the "Hindanger" than the mere discussion that you had with Mr. Wintemute? As you have testified, you did not ship the eggs.

A. Well, as I have said twice already, I had a subsequent discussion both with Mr. Wintemute and Mr. Lawler; Mr. Lawler was traffic manager with respect to the movement on the "Hindanger".

(Testimony of B. F. McKibben.)

Q. When were these subsequent discussions with Mr. Wintemute?

A. I have here a wire from Mr. Benjamin at Los Angeles at the time of their annual meeting, the annual meeting of the Pacific Egg Producers there, following our preliminary discussion, and this is the date, February 17, and I recall that following the receipt of that I had some further discussion with Mr. Wintemute; I can not recall the date, but it was within a week following our preliminary discussion.

Mr. GRAHAM: I think that is all.

Mr. SAPIRO: I think that is all.

The COMMISSIONER: We will take an adjournment now until Monday at 2 p.m.

(An adjournment was here taken until Monday, May 9, 1932, at 2 p. m.) [206]

Monday, May 9, 1932.

JAMES E. ROTHER,

called for the libelants, sworn:

Mr. SAPIRO: Q. Where do you reside, Mr. Rother?

A. Berkeley, California.

Q. You are employed by the Poultry Producers of Central California? A. Yes.

Q. You are the sales manager of that organization? A. Yes.

Q. Did you attend a conference at which there were present Mr. Wintemute and Mr. Benjamin

(Testimony of James E. Rother.)

and Mr. McKibben and some other persons?

A. I did.

Q. What month and year was that held?

A. That was in 1930 about the middle of February.

Q. About the middle of February, 1930? A. Yes.

Q. Was Mr. Lawler at that conference? A. No.

Q. At that conference there was discussed the matter of shipping eggs from the Pacific Coast to Buenos Aires? A. Yes.

Q. And was there a discussion of the shipment by the steamer "Hindanger"? A. Yes.

Q. Will you state what was the general subject-matter of the conference there?

Mr. GRAHAM: May it please your Honor, it is agreed that my objection made at the hearing the other day still stands to all of this line of testimony?

Mr. SAPIRO: To all witnesses.

The COMMISSIONER: Yes, exactly.

A. We discussed at that meeting the shipping of eggs to South America, Pacific Coast eggs, and a number of things. The thing we wanted to arrange for first was the refrigeration space, and the next would be the time of sailing from Pacific Coast ports, and the [207] expected arrival date at Buenos Aires, and the rates, and I think in a general way that embraces all of it. We went into considerable detail about each one of those things.

Mr. SAPIRO: Q. Was there a discussion as to the time of the voyage? A. Yes.

(Testimony of James E. Rother.)

Q. What was said concerning the time?

A. The time that we were planning on was about 35 days between our port here in San Francisco and Buenos Aires.

Q. Do you know whether the steamship officials stated that was the time of their voyage, the time of transit?

A. I could not pin that to any particular person, but it was discussed at that meeting, I think that there were schedules of sailing dates mentioning their time.

Q. Showing the time?

A. Yes, and that was the basis of our discussion.

Q. You had those schedules of sailing dates before you? A. Yes.

Q. Was there any discussion as to the time of leaving of the steamer "Hindanger"?

A. Yes, I believe that that steamer was supposed to go out of San Francisco about the 24th of March.

Q. We want to know about the discussion at the meeting.

A. The "Hindanger" was discussed from the standpoint of availability particularly; on account of the sailing date being out of San Francisco for the 24th of March it would make that steamer available for the supply of eggs that we had available for shipment. There was also some talk of a steamer sailing earlier than that, the "Villanger". As I remember it, the "Villanger" was scheduled to sail earlier than our supply would have been available, whereas the "Hindanger", going about the latter

(Testimony of James E. Rother.)

part of March, gave us time to accumulate enough eggs to make a shipment that would justify the rates that were asked. Then the steamer that was following the "Hindanger" would make the arrival in Buenos Aires too late to give [208] us a market that we must have, because the middle western eggs followed a little later and would be exported on the Atlantic Seaboard and they would compete with us in the market at Buenos Aires more seriously than the earlier shipments from the Pacific Coast. Then in addition to that, there was danger of shipping into Buenos Aires from Holland, and European countries. There is a time of the season when I might say that our production of eggs comes on heavy and it precedes our time of storing, which is usually around during the month of March, and at that particular time is the best time because leaving here then they would arrive in Buenos Aires to have the best market in Buenos Aires. If we had waited later it would be too late on that end, and it would also be too late for shipments here, as our costs would be larger, as we entered into storage; as we enter into the storing period on the Pacific Coast there is usually an advance in the cost of eggs. If we ship those eggs out earlier than the latter part of February or first of March we got them at the lowest cost.

Q. Were those matters discussed at that conference? A. They were.

Q. All of them? A. Yes.

Mr. GRAHAM: I move to strike that testimony

(Testimony of James E. Rother.)

out as being of a general nature, it having no reference to the shipment that was actually made on the "Hindanger."

The COMMISSIONER: The latter part may go out. The first part is responsive but I do not believe the latter part would be responsive.

Mr. GRAHAM: I do not want to object to the witness testifying, but I think he should testify in question and answer form rather than by general terms.

Mr. SAPIRO: I think that all he has been testifying is by question and answer.

The COMMISSIONER: The latter part may go out. [209]

Mr. SAPIRO: Q. But all those matters were discussed at that conference?

A. They were. We would not consider making shipments down there unless we expected a profit by doing so, and we had to take the market into consideration.

The COMMISSIONER: Q. You discussed mid western eggs and Holland eggs, and all that entered into the conference? A. Yes.

Mr. SAPIRO: Q. The factors also as to market conditions were discussed at that conference?

A. Yes, we had to emphasize the need for an early sailing date, and that matter.

Mr. GRAHAM: This goes in subject to objection and motion to strike out?

Mr. SAPIRO: Yes.

(Testimony of James E. Rother.)

Q. Was there discussion in reference to the "Hindanger" in regard to this 35-day sailing?

A. Yes.

Q. Was there a rate fixed at that time?

A. To the best of my recollection the rate was not definitely settled. We asked for a rate, and I am not sure about what rate we asked for at that time, but to the best of my recollection it was 30 cents a cubic foot.

Q. When the conference broke up was there any understanding that you would have further negotiations, or the parties would consider further negotiations about the rate?

A. Yes, there was. My recollection is that the conference did not settle anything more than that we were to carry on negotiations. We saw that this steamer we had in mind, the "Hindanger" would sail at the end of March and we were to continue negotiations about making the shipment. There were no definite terms that we would ship at.

Q. But there was a definite statement made as to the time of sailing? A. Yes.

Mr. GRAHAM: I object to any leading questions of this witness.

Mr. SAPIRO: He had already testified to the general nature of the conference.

Mr. GRAHAM: Just a minute, let me state my objection. [210]

Mr. SAPIRO: You have stated it.

The COMMISSIONER: The question is leading.

Mr. SAPIRO: If your Honor please, he inter-

(Testimony of James E. Rother.)

rupts my examination. I do not reflect upon his courtesy or lack of courtesy in so doing, in asking a question, and endeavor to cross examine before the witness was turned over to him, and I am just redirect examining him on the questions that he asked.

The COMMISSIONER: But your question was, there was a definite statement as to the time of sailing?

Mr. SAPIRO: Yes.

The COMMISSIONER: That would be a leading question.

Mr. SAPIRO: Was there anything indicated as to the question of time of sailing?

A. As near as I can remember it, there was a schedule setting forth the sailing date, and as near as I remember it was the 24th of March.

Q. What about the length of the voyage?

A. It was supposed to be a 35-day voyage.

Q. When the conversation ended was that left up in the air?

A. Not about the time in transit, no; it was understood that the sailing time was 35 days, as I remember it, the sailing schedule was 35 days.

Q. Did you report the result of this conference to Mr. Lawler? A. Yes.

Mr. SAPIRO: That is all.

Cross Examination.

Mr. GRAHAM: Q. What is the connection between the Poultry Producers Association and the

(Testimony of James E. Rother.)

Pacific Egg Producers Cooperative?

A. The Pacific Egg Producers Cooperative is the selling agency, with offices in New York, which is jointly owned and jointly representative of the Pacific Egg Association, at that time the Washington Cooperative Egg and Poultry Association of Seattle, and the Poultry Pro- [211] ducers of Central California at San Francisco, and the San Diego Association.

Q. Mr. Rother, we have entered into a stipulation that the Pacific Egg Producers is the agent for Poultry Producers: That is the fact, is it?

A. Yes, the selling agency.

Q. Just so I will get that straight in my own mind, seeing that there are two or three different organizations spoken about, do I understand that you have the Poultry Producers?

A. Of Central California.

Q. Of Central California? A. Yes.

Q. And the Washington Cooperative, and then the Pacific Egg Producers?

A. They are three different associations.

Q. Did they all form a unit in these negotiations?

A. Mr. Benjamin happened to be here at the time, he was here attending some meeting, he is general manager of the Pacific Egg Producers, and the Pacific Egg Producers, under their contract, handled the export business for these Pacific Coast Associations.

Q. Then it is the Pacific Egg Producers that would be the one more specifically that entered into

(Testimony of James E. Rother.)

the agreement, if anyone did enter into it?

Mr. SAPIRO: Just a moment, that is calling on the witness to prove a stipulation. You have stipulated and I have stipulated, and it happens to be the fact that Pacific Egg Producers is just an agent. The Washington Cooperative Egg & Poultry Association owns the eggs that it sells, and the Poultry Producers of Central California, not the Cooperative Association, owns the eggs that it sells.

Mr. GRAHAM: I appreciate that. As I understood this witness, he was about to testify that the other association had charge of the export trade for your association and the Washington association.

Mr. SAPIRO: The marketing agent.

Mr. GRAHAM: You tell me, Mr. Rother, because I don't know, [212] what the relation of those three is.

A. The Pacific Egg Producers is the selling agent which sells eggs that are furnished by those shipping associations.

Q. That is what I understood your answer to be. Is it your contention that you, representing the Poultry Producers of California, being one of the parties libelant in this litigation, made the contract for the shipment of these eggs on the "Hindanger"?

A. I was one of several who attended this meeting. The principal negotiations and conversations were carried on by Mr. Benjamin. In fact I do not recall that I had very much of a part in the discussion.

(Testimony of James E. Rother.)

Q. Isn't it a fact that the discussion which took place at this February meeting, about which you have testified and about which you heard Mr. McKibben testify, were general discussions and did not result in any contract having been made?

Mr. SAPIRO: Just a moment: You mean did not result at any time, or on that day?

Mr. GRAHAM: I think the question speaks for itself.

The COMMISSIONER: Limit it to that day.

A. There was no definite contract on that day, as I recall it.

Mr. GRAHAM: Q. Did you representing the Poultry Producers Association at any time thereafter, make any contract with the parties respondent in this litigation as to the carriage of these eggs on the "Hindanger",—just limiting it to yourself representing the Poultry Producers Association?

A. Did I make any contract? Is that the question?

Q. Yes.

Mr. SAPIRO: We will object to that as calling for the opinion of the witness.

Mr. GRAHAM: It certainly doesn't call for an opinion of the witness. [213]

The COMMISSIONER: He would know whether he entered into a contract with them.

A. As I said——

Mr. SAPIRO: That is a perfectly proper question. I just wanted to understand it.

(Testimony of James E. Rother.)

The COMMISSIONER: Yes, I think it is. You personally would know, wouldn't you?

A. As I said, I did not carry these negotiations on.

Mr. GRAHAM: Q. In other words, you did not enter into any contract for the Association yourself?

A. I was there and was interested because my duties made it necessary, but I know what was going on and because part of my work was to assemble the eggs for shipment and the shipping date was very important, but the actual negotiations at that meeting were mostly conducted by Mr. Benjamin with Mr. Wintemute.

Mr. GRAHAM: Of which you have no particular knowledge, so I move to strike out the answer of the witness as not responsive.

The COMMISSIONER: Q. Did you yourself have any kind of an agreement with the respondent, you personally? A. I did not.

Mr. GRAHAM: Representing his association?

The COMMISSIONER: Representing his association, of course.

Mr. GRAHAM: You did not? A. I did not.

Q. Just a minute, you at that time, neither entered into a contract nor did you at any other time enter into a contract for shipment of eggs, you representing yourself and your association?

A. I could not say that I did.

The COMMISSIONER: Your answer would be no?

(Testimony of James E. Rother.)

A. I know this, we shipped the eggs.

Mr. GRAHAM: Q. Aside from the shipment of the eggs and the bill of lading which represented that shipment, you did not enter into, your association did not enter into any oral or other [214] contract? A. They did, yes.

Q. Will you tell me when the contract was entered into and with whom?

A. As a matter of fact these negotiations were made in advance of the bill of lading.

Q. When was the contract that you testified to have been entered into, made with the respondents, on what date?

A. I could not answer that question because Mr. Benjamin carried on these negotiations and I am not certain when they were completed.

Q. So that as far as you are concerned, you, acting for the Poultry Producers Association, did not make any contract? I think you said that was a fact? A. I did not make any contract.

Q. Did I understand you that your discussion on this meeting in February, which I assume was the 15th of February, the same as Mr. McKibben testified the other day——

A. I believe that date is correct. I could check back on circumstances that would verify that.

Q. I understand you that on that occasion you discussed particularly the shipment of eggs on the "Hindanger" which you thought you might make?

A. Yes.

Q. And at that time you discussed, I mean pri-

(Testimony of James E. Rother.)

marily, the question of rates, didn't you?

A. No, time was a factor, rates was a factor, refrigeration space, availability of the eggs, and the time they were to arrive there in Buenos Aires.

Q. And who did you ask in the General Steamship Corporation or in the Westfal Larsen Company, and who informed you that the ship would make the voyage in 35 days?

A. That was a matter that was of public knowledge by publication in their schedule.

Q. Had you seen the schedule yourself?

A. I am not certain whether I saw it or not.

Q. Is it not a fact that you had not seen the schedule?

A. No, I would not want to say that, because may be I did see it.

Q. You don't remember?

A. Our traffic man, Mr. McCurdy, usually [215] attends to those things, and it was common discussion about the office at the time, because that was a matter of most importance to us.

Q. The most you can say in connection with the sailing was, that around your office it was public discussion that you thought the vessel would make the voyage in about 35 days?

A. Not only with us, but the steamship company gave us that information too, their schedules, and as I recall, there was never any question about the schedules being incorrect nor any reason why they would not make it.

(Testimony of James E. Rother.)

Q. Do I understand you did not have any discussion, and nobody informed you at the General Steamship Company, or Westfal Larsen, that the ship would make 35 days or not?

A. I do not recall any denial of it.

Q. Do you recall any discussion about it?

A. Certainly, the matter was talked about. That was the basis of our entire negotiations, the time they could make.

Q. And somebody in the organization informed you that the ship would make 35 days? A. Yes.

Q. Do you know who it was?

A. It was Mr. Benjamin's discussion with Mr. Wintemute.

Q. In the February meeting, do you know who it was in the organization which operated the ships who said that the voyage could be made in 35 days?

A. Mr. Wintemute was the agent of the steamship company when we were there.

Q. Is it your belief that it was Mr. Wintemute?

A. It is my belief that it was Mr. Wintemute.

Q. That is your present recollection? A. Yes.

Q. That on February 15 Mr. Wintemute told you the ship would make the voyage in 35 days?

A. Yes.

Q. Had your organization shipped any eggs prior to the shipment that was made on the "Hindanger" to the east coast of South America? [216]

A. Yes.

Q. What ship had you made the previous shipments on?

(Testimony of James E. Rother.)

A. I don't recall if we made any in that season, but we shipped some a year or two before that.

Q. Do you remember on what ship?

A. The "Gothic Star".

Q. That is one of the Blue Line boats? A. Yes.

Q. Do you recall where the shipments were made from?

A. From San Francisco and some from Seattle.

Q. Had you shipped on any other vessel?

A. We might have.

Q. Do you know?

A. Yes, we did. I don't know that they went to Buenos Aires, they went to South America.

Q. Had you shipped any to Buenos Aires?

A. I am not absolutely sure. We shipped in 1928 on the "Gothic Star" and we talked about shipping on a number of vessels in 1929, but we did not make any shipments that year.

Q. Any in 1930?

A. In 1930 there were some shipments made, but I dont' recall if they were made from San Francisco or Seattle. There were some small shipments that went out early.

Q. Earlier than these shipments on the "Hindanger"? A. I am not absolutely sure about that.

Q. Did your organization make the shipments?

A. No, we did not.

Q. You did not make any?

A. The Pacific Egg Producers made them, from Seattle.

Q. Not by you?

(Testimony of James E. Rother.)

A. I am not sure. I do not recall if we had any eggs on those boats. I am rather doubtful about our having any.

Q. Did you make any shipments subsequent to the shipment on the "Hindanger", on any vessel to South America? A. No.

Q. You made none at all?

A. Not to Buenos Aires.

Q. You would be the one in your organization who would know about your shipments?

A. Yes, Mr. McCurdy would know probably better than I do, because he attends to all the papers. [217]

Q. He is in charge of the traffic?

A. Yes, but there was no large shipment. There might have been a shipment of a few cases of eggs. There was no large shipment.

Mr. SAPIRO: What year are you talking about?

Mr. GRAHAM: 1930.

Mr. SAPIRO: You mean the same year this shipment was made?

Mr. GRAHAM: Yes.

Q. Is it not a fact that in the meeting on May 15, that you and your associates, representing the shipments of these eggs were primarily interested in the possibility of making a shipment on the "Villanger"?

A. We talked about the "Villanger."

Q. Just answer my question yes or no.

A. The "Villanger" was not available.

Q. Just a minute; answer yes or no.

A. No. The vessel of primary interest was the

(Testimony of James E. Rother.)

"Hindanger" because the "Villanger" went out too early.

Q. You reached that conclusion on February 15, that the "Villanger" was not in the picture, and that your shipment should be on the "Hindanger"?

A. I would not say it was not in the picture, for a time of shipment.

Q. How many eggs were you talking about moving on the "Hindanger" in February?

A. Approximately 15,000 cases.

Q. You were going to move those from San Francisco were you?

A. Not all of them. We planned on moving about two thirds from San Francisco and one third from Seattle.

Q. When you say "we", do you mean the three egg associations?

A. Well, I am an officer in both of them, so I am accustomed to saying "we", which might be construed to be either one.

Q. It is a fact that your testimony in connection with this shipment, general testimony, refers to all three of the associations, or any one of them?

A. No; my position as sales manager of the [218] Poultry Producers of Central California, it was of little interest to me what Washington shipped, but it is a lot of interest what California shipped.

Q. When you talk about "we" to whom do you refer?

A. The Poultry Producers of Central California or the Pacific Egg Producers.

(Testimony of James E. Rother.)

Q. Not the Washington? A. No.

Q. You were going to ship 15,000 cases on the "Hindanger"?

A. We were going to ship probably two thirds of 15,000 cases and Washington was to ship the remainder. In other words, it was not definitely known at that time how many we would ship, or how many would go from Washington, but between the two associations they expected to fill the space of approximately 15,000 cases.

Q. Had you, yourself, ever had any experience whatsoever in the export trade of eggs to South America from the Pacific Coast? A. Yes.

Q. How many shipments did you have something to do with?

A. Only those by the Poultry Producers of Central California, the first ones being the "Gothic Star" in 1928.

Q. Then there were none between that time and the "Hindanger"?

A. There were to South America, but no large shipments to Buenos Aires. We had a lot of correspondence and a lot of negotiations with people down there, but if the market was right the ships were not available.

Q. Who handled those, you or Mr. McCurdy?

A. Mr. McCurdy handled the details of the papers, but the market information usually came through me.

Q. But the information in connection with traffic, is Mr. McCurdy's problem? A. Yes.

(Testimony of James E. Rother.)

Q. So that you are not personally very familiar with the movements of this vessel? A. Yes, I am.

Q. You are familiar? A. Yes. [219]

Q. Did you know at the time you had this meeting in February the ports the "Hindanger" was scheduled to go? A. No.

Q. That did not enter into the picture at all. You knew, did you not, that she was a ship carrying general cargo from the Pacific Coast to South America?

A. My knowledge of the ship was very limited. I knew that the ship had refrigeration space for the shipment of eggs to South America. They promised us a schedule of 35 days to get the eggs down there. The ship was supposed to sail about the end of March, and with that information we thought it was a good boat to ship the eggs.

Q. That promise that was made to you, it was your thought it was made to you by Mr. Wintemute?

A. I can not say that was made directly to me. It was made to our group.

Q. You were a member of that group?

A. Of which I was a member.

Q. That is what I mean.

A. As I said before, Mr. Benjamin carried on the principal part of the negotiations, and I was more of a listener-in than one of the actual participants.

Q. Then is it not a fact you can say that on the 15th of February there was any statement made by Mr. Wintemute or anybody else representing the

(Testimony of James E. Rother.)

vessel owners or operators, that the ship would make it in 35 days?

Mr. SAPIRO: That is just the opposite of what he said.

Mr. GRAHAM: He can so state.

The COMMISSIONER: I think that question is proper.

Mr. SAPIRO: He can not make a statement that he said so and so when it is not a fact.

Mr. GRAHAM: I did not say so.

Mr. SAPIRO: That is the effect of the statement.

Mr. GRAHAM: The witness said there was a general conversation there, which was conducted by Mr. Benjamin.

The COMMISSIONER: My understanding is, that he said the time [220] consumed in the sailing was discussed, and he thinks that Mr. Wintemute, although he is not sure, stated the time that the boat was to make.

A. It was certainly discussed by Mr. Benjamin and Mr. Wintemute.

Q. Who mentioned 35 days?

A. That was a matter of record in schedules.

Q. What counsel wants to know is this, do you remember whether Mr. Wintemute made a representation that it would take 35 days?

Mr. GRAHAM: That is just what I want to know. A. I believe he did.

The COMMISSIONER: You are not sure whether he did or not?

(Testimony of James E. Rother.)

A. I know that the matter was discussed there and the basis of the whole negotiations was the 35 days in transit. Whether or not Mr. Wintemute said that it was 35 days, or whether he handed us a schedule and told us the 35 days that way, I don't know.

Mr. GRAHAM: Q. And whether you had it in mind that the ship would make it in 35 days?

A. I have not got it in mind from where he gave his information, but the basis of the transaction was the time she could make.

Q. Isn't it a fact, if you had any ideas on the subject of 35 days you got those ideas from somebody in your organization?

A. No, I got that from the General Steamship Corporation's office.

Q. That is what I am trying to find out from you. I have asked it in as many ways as I could. What I want to know is whether Mr. Wintemute, or anybody else in the General Steamship Corporation, or in the Westfal, Larsen Company, at that meeting in February represented to you, or whether you heard it represented to anybody else in that meeting that the ship would make the voyage in 35 days?

A. Yes, that was mentioned, that it would make it in 35 days.

Q. I am asking you, did Mr. Wintemute——

Mr. SAPIRO: If that is not an answer to the question I [221] don't know what an answer could be.

A. It was mentioned by the General Steamship Company's office; they solicited your business based

(Testimony of James E. Rother.)

on a 35-day schedule. Otherwise there would have been no need for the meeting.

Mr. GRAHAM: Q. Can't you answer the question?

The COMMISSIONER: Q. Who made that representation, if you recall?

A. I don't remember that anybody made it directly to me at that meeting, but it was the basis of the whole negotiations.

Mr. GRAHAM: I think your Honor has in mind what I am trying to get at. What I want to find out from this witness is, who it was in the General Steamship Corporation that made any representation that the ship would get there in 35 days.

A. I have just said that the matter was a matter of record, there was a schedule given to us, of sailing which mentioned 35 days on it; the schedule was signed by the General Steamship Corporation.

Q. That is just what I want to know, whether or not Mr. Wintemute repeated that 35 days to you.

A. I don't know, but I know we went there expecting to get a rate, and the matter of time was discussed, in fact that matter was paramount, and the schedules were there and they had handed them to us, and we had every reason to believe what they said, but whether Mr. Wintemute read those schedules to me, I don't know.

Mr. SAPIRO: I think I can clear up any question. At that particular time was the time of transit discussed? A. Yes.

Q. Was 35 days discussed? A. Yes, it was.

(Testimony of James E. Rother.)

Mr. GRAHAM: I move to strike out both question and answer. I think I have a right to cross examine this witness and find out who, if anybody, made the representation that the ship was going to get there in 35 days or any number of days.

Mr. SAPIRO: But you have not the right to take the attitude [222] that a man has to come here and say as you are going to make it appear here, "I represent to you that this ship is going to take 35 days for transportation of your particular product". We know very well that this was not carried on that way. You know as well as I do that these men would carry on a conversation, and that in the course of that conversation,—most of the conversation being carried on probably by two leading men in there, Mr. Wintemute representing the Steamship Corporation and Mr. Benjamin on behalf of the Egg Associations, that in stating the time of shipment he would not say or represent it, but it would be part of the discussion.

Mr. GRAHAM: If there is any objection to the use of the word "represent" I will ask Mr. Rother if Mr. Wintemute said to him or to anybody in that meeting that the ship would go down in 35 days. It seems to me that question is a simple one to answer. He either did or did not.

A. I don't recall whether Mr. Wintemute did—there was another representative of the steamship corporation there besides Mr. Wintemute; I don't know his name.

Q. Captain Petersen?

(Testimony of James E. Rother.)

A. I am not certain, I don't recall his position now, but there was Mr. Wintemute who carried on the principal discussion for his company. Mr. Benjamin the principal discussion for our company; I do not know that the time was mentioned and that the representation was made to us that the shipment could be taken down there in 35 days. Had that not been the case I would not have consented to try to assemble the eggs for shipment.

Q. In other words, you would not ship on any ship which would require over 35 days?

A. I would not ship on any ship that would take more than 35 days. I might stretch it a day or so.

Q. Thirty-six.

A. But any ship that would not make that voyage in approximately 35 days would not have been a ship that we would have selected, because the chances were too great of our losing [223] money on the shipment.

Q. So that your loss would be a loss as a result of a shipment of more than 35 days in duration?

A. We wanted to reach that market——

Q. Just answer my question, I know all about the market. I am not interested in those general answers. A. Pardon me?

Q. Answer the question or we will never finish. Yes or no?

Mr. SAPIRO: We will object to that as immaterial, irrelevant and incompetent, and an improper question that does not take in all of the elements.

Mr. GRAHAM: I think it does.

(Testimony of James E. Rother.)

The COMMISSIONER: You can bring it out on redirect examination. I will overrule the objection.

A. I would not say that we would have a loss if it would be more than 36 days in duration, because that would depend on the time when the ship left, when it sailed. The important thing was to get the shipment in Buenos Aires at an early date to avoid loss.

Mr. GRAHAM: Q. Can you tell me what was the latest date which you figured on to arrive in Buenos Aires to avoid a loss?

Mr. SAPIRO: For this particular shipment, do you mean?

Mr. GRAHAM: I am referring to the same shipment that has been referred to.

Mr. SAPIRO: We will object to that, it is obvious that you might ship a thousand cases at a certain date and it would not occasion any loss, and yet if you shipped 5000 cases at that time it would cause a decided loss. A question like that is improper.

Mr. GRAHAM: I think the witness has been testifying as to general market conditions, and I think the question is proper and will bring out the information.

The COMMISSIONER: I think it can go in subject to a motion of yours to strike out, the same motion as Mr. Graham has, that is, if it is not relevant or material. [224]

A. I might answer that this way, I would not choose to O.K. a shipment for Buenos Aires which

(Testimony of James E. Rother.)

would arrive there later than the 15th of May.

Mr. GRAHAM: Q. At this meeting on the 15th of February is it not a fact that you did not arrive at any conclusion whatsoever, but that the meeting broke up with a general understanding that you were to confer again and see if you couldn't get together?

A. I don't remember just how the meeting broke up, but my recollection is as to the matter that was in mind, we had not completed it.

Q. You had reached no conclusion?

A. Well we had reached this much of a conclusion, that we were going to make a shipment down there on the "Hindanger".

Q. You were sure of that?

A. Yes. I was sure enough, because I started in to assemble the eggs for shipment.

Q. But at that time, on the 15th of February you had not entered into any contract at all?

A. We did not have any written contract.

Q. Had you entered into any kind of a contract?

A. I think we had.

Q. Will you tell me what the contract was that you had entered into?

A. That we were to ship eggs on the "Hindanger" with a time schedule of 35 days, and that the boat was to sail from San Francisco the latter part of March.

Q. You had not reached any agreement on the amount of eggs you were going to ship, or whether they were from here or Seattle?

A. Approximately 15,000 cases, but we were not

(Testimony of James E. Rother.)

thoroughly sure about how much from California and Washington.

Q. You did not reach any agreement on the rate of freight?

A. I don't remember about that.

Q. Don't you know that you did not reach any agreement on the rate of freight?

A. No, I do not recall.

Q. You do not remember that, you say?

A. I am not certain whether Mr. Wintemute confirmed the rate already made or not. [225]

Q. What was the rate that the eggs were moved on?

A. It was 70 cents a case, 30 cents a cubic yard.

Q. Isn't it a fact that in the February meeting you had not fixed any rate at all for any shipment?

A. As I recall, there was not an absolute confirmation of the rate at that time.

Q. Isn't it a fact also, that the only information that you had at that time as to the sailing and length of voyage, you obtained from this card which counsel has offered in evidence as Exhibit No. 1?

Mr. SAPIRO: We will object to that as having been asked and answered a dozen times.

A. I did not state that that card was the only information that we had about the sailing date, or time.

Mr. GRAHAM: Q. If this is not the only information, and you don't know who it was in the General Steamship Corporation who made the representation or told you that the ship would get there

(Testimony of James E. Rother.)

in 35 days, where did you get the information?

A. My best recollection is, it was Mr. Wintemute.

Mr. GRAHAM: I think that is all.

JOHN LAWLER,

called for the libelants, sworn:

Mr. SAPIRO: Q. Where do you reside, Mr. Lawler? A. San Francisco.

Q. You are the general manager of the Poultry Producers of Central California? A. Yes.

Q. You are also secretary of the Pacific Egg Producers Cooperative?

A. Director and secretary.

Q. The Poultry Producers of Central California is a cooperative marketing organization? A. Yes.

Q. For marketing the eggs of its members?

A. Yes.

Q. It acquires the title to those eggs?

A. Yes.

Q. And the Washington Cooperative Egg & Poultry Association, the [226] libelant in the other action is a similar organization? A. Yes.

Q. The Pacific Egg Producers was organized by the Poultry Producers of Central California, the Washington Cooperative Egg & Poultry Association and the San Diego Poultry Producers Association to act as the selling agent for those three cooperative associations? A. Yes.

Q. And it is a marketing agency pure and simple?

(Testimony of John Lawler.)

A. Yes.

Q. It does not take title to your eggs? A. No.

Q. So that, as stipulated in this action, the ownership of the eggs involved in these cases was in the respective associations? A. That is right.

Mr. GRAHAM: Q. And also that the Pacific Egg Producers Cooperative acted as an agent for the two others? A. Yes.

Mr. SAPIRO: As general manager of the Poultry Producers of Central California and also as an officer of the Pacific Egg Producers Cooperative, were you in touch with the negotiations for the shipment of eggs to Buenos Aires in 1930?

A. I was not in direct contact with the preliminary negotiations during the period that Mr. Rother testified to, only as I received reports from him and Mr. Benjamin as to this conference.

Q. That is, you did not attend this particular conference referred to in February? A. No.

Q. You did receive a report of the conference from Mr. Rother and Mr. Benjamin? A. Yes.

Q. By the way, Mr. Benjamin's office is where?

A. In New York.

Q. That is where he is at present? A. Yes.

Q. You have heard Mr. Rother and Mr. McKibben testify? A. Yes.

Q. Did they report to you substantially what was testified to in this proceeding?

A. Their testimony is about the same as the information I got from Mr. Benjamin, as I recall it, because I met [227] Mr. Benjamin in Los Angeles at

(Testimony of John Lawler.)

the Pacific Egg Producers meeting immediately after that conference.

Mr. GRAHAM: I move to strike out the question and answer; I think it was immaterial what was reported to him. One of the witnesses who is alleged to have reported to him has already testified and if need be the other witness could, I suppose, testify too. I do not think it is material what was reported to this gentleman. If he was not at any one of the conferences it is immaterial.

The COMMISSIONER: It would be hearsay.

Mr. SAPIRO: No. He is not asked for the conversation. The conversation has been testified to by a person who participated in it. He has just stated that the substance of the conversation was reported to him. If I tried to prove the alleged conversation by him alone I would say it would be hearsay.

The COMMISSIONER: I will allow it to stand subject to a motion to strike.

Mr. SAPIRO: Q. Mr. Lawler, did you have a conversation with Mr. Wintemute some time in March of 1930? A. Yes.

Q. When was that? A. March 10.

Q. That was the telephone conversation as to which Mr. Wintemute testified? A. Yes.

Mr. GRAHAM: Just a minute; I object to that. I don't know that Mr. Wintemute testified to any telephone conversation on March 10.

The COMMISSIONER: I don't know whether he did or not.

(Testimony of John Lawler.)

Mr. SAPIRO: He said he had a telephone conversation in March, the early part of March.

Mr. GRAHAM: He did not say on March 10.

Mr. SAPIRO: I am asking if it was on that date.

Q. What was the nature of that conversation? Was it by telephone?

A. Yes, my recollection is, by telephone. [228]

Mr. GRAHAM: What I object to is the statement that it was on March 10.

Mr. SAPIRO: He previously had said he had a conversation.

Q. What was stated in that conversation, Mr. Lawler?

A. I confirmed the space on the "Hindanger" which had been arranged for on the Saturday previous by Mr. Van Bokkelen.

Q. What did you tell him?

A. I told him that we would ship from ten to fifteen thousand cases of eggs on the "Hindanger".

Q. Was the rate agreed upon?

A. The rate was agreed upon some time prior to that. I had no negotiations on the rate as far as I can remember.

Q. Had you been advised as to it?

A. Yes, I had; if I remember correctly I had a wire from New York that the rate had been agreed to.

Q. Were these eggs that were shipped shipped at that rate? A. Yes.

Q. Did Mr. Wintemute accept the confirmation of the space? A. Yes.

(Testimony of John Lawler.)

Q. At that time did you have in mind the statements that had been made in reference to the time of transit of this vessel?

A. In that respect I could give you the same information that has already been given to you by Mr. Rother.

Q. What did you have in mind?

A. About 35 days in transit. The boat had been somewhat delayed, if I remember correctly, it was somewhere around the first of April that would bring it in—at least the first part of May.

Q. Did the information that you had as to the sailing date and the time of the voyage have anything to do with your confirmation of this space?

A. The time element was one of the most important elements in this whole thing.

Q. Mr. Lawler, did you make the contract for the shipment of these eggs on that date?

A. The contract with whom?

Q. With Westfal, Larsen & Company through the General Steamship Corporation?

A. The contract, or the arrangement was made with [229] Walter Van Bokkelen and he telephoned that I had to confirm it with Mr. Wintemute.

Q. Did you confirm it? A. Yes.

Q. And it was made on behalf of the Poultry Producers of Central California——

Mr. GRAHAM: Do not lead the witness.

Mr. SAPIRO: On whose behalf was that contract made?

A. I do not believe it was specifically made on

(Testimony of John Lawler.)

behalf of the Poultry Producers or Pacific Egg Producers, but I think that being a commercial concern, that was not the worry of Mr. Wintemute particularly, whether I was taking it on behalf of the Poultry Producers of Central California, or the Pacific Egg Producers.

Q. Was there a definite amount agreed upon?

A. The amount was left open, between ten thousand and fifteen thousand cases, because it was doubtful whether or not the Washington Cooperative would be able at that time to go through with their part of it. That is the reason why there was a minimum of ten thousand and a maximum of fifteen thousand arranged for.

Q. Was the 10,000 minimum guaranteed?

A. Yes, the 10,000 minimum was guaranteed because our association, the Poultry Producers of Central California could ship that many without any assistance from the Washington Cooperative.

Q. Was it agreed in that conversation that you would give them at least ten thousand? A. Yes.

Q. You did ship eleven thousand, as a matter of fact? A. Yes.

Q. Now the conversation that you had on that date when the confirmation was made, was that in reference to this shipment on the "Hindanger"?

A. Yes.

Q. It referred to the shipment that subsequently went out? A. Yes.

Mr. SAPIRO: That is all. [230]

(Testimony of John Lawler.)

Cross Examination

Mr. GRAHAM: Q. That was on the 10th of March? A. Yes.

Q. How do you know it was on the 10th of March?

A. Because I looked at a copy of a letter in the file that I wrote to the Pacific Egg Producers on that date.

Mr. GRAHAM: I ask for the production of the letter.

Mr. SAPIRO: Here it is.

Mr. GRAHAM: Q. From this letter you gather the impression that you talked to Mr. Wintemute on the 10th of March? A. Yes.

Q. I show you the letter and ask you if you can find any reference in there to the fact that you talked to Mr. Wintemute on that date on the telephone or any other way.

A. It does not say in this letter that I talked to Mr. Wintemute.

Q. Did you write this letter of March 10?

A. I dictated the letter, yes.

Q. And signed it after it was sent?

A. No, not after it was sent, before it was sent.

Q. When did you first have any negotiations with Mr. Wintemute, or the General Steamship Corporation in connection with the shipment of any eggs to South America?

A. My recollection is I discussed the shipment of eggs to South America during 1929 with Mr. Wintemute.

(Testimony of John Lawler.)

Q. But came to no conclusion?

A. That had nothing to do with this shipment whatsoever.

Q. When was the first discussion that you did have in connection with this shipment?

A. I think I had one informal discussion with Mr. Wintemute about the last Tuesday, or the last Wednesday, rather, of January 1930. I identify that date approximately because Mr. Benjamin was out here to our annual meeting, which was the last Tuesday of January, and I think we had a little discussion on the Pacific Egg Producers office and my recollection is that [231] Mr. Wintemute was there too.

Q. That was about the 29th of January?

A. I am not sure about that date.

Q. That is the last Wednesday in January?

A. It would be along about that date. I think we were discussing this matter in a general way in the Pacific Egg Producers office.

Q. At that time you had in mind the desire on your part to ship eggs to South America, and the desire on the part of the Steamship Company to to carry them? A. Yes.

Q. And you named generally the ships that they had available, and talked rates and other features that would lead up to getting together thereafter?

A. We had a discussion also with the McCormick line.

Q. How about the Blue Star?

(Testimony of John Lawler.)

A. I think we might have talked to the Blue Star line also.

Q. Following that discussion about the 29th of January, if you will take my word for it that it is the 29th of January, when was your next discussion with Mr. Wintemute?

A. I do not believe I discussed the matter with Mr. Wintemute again until March 10, although I would not say,—we might have had some telephone conversations of a general character.

Q. You have no recollection of them?

A. I have nothing definite.

Q. Mr. Wintemute made no representation or statement to you that the vessel would get down there in 35 days? A. No, not to me.

Q. For whom were you acting in these discussions, the Poultry Producers or the Pacific Egg Producers, or the Washington Producers, or all three?

A. I presume I acted in a rather dual capacity, the Pacific Egg Producers acted as the selling agent, and naturally all documents and everything was made out in the name of that organization, the shipping documents, but the eggs actually belonged to each of the other organizations. [232]

Q. You were really acting in some capacity for all the three? A. Yes.

Q. Who was Miss Hunt?

A. Miss Hunt had charge of the Pacific Egg Producers' office at that time.

Q. This conversation that you had with Mr. Win-

(Testimony of John Lawler.)

temute, which you claim to have had on the 10th of March, was the result of a contract that had previously been made between Mr. Wintemute, representing the ship, and Mr. Van Bokkelen, and you were going to supply the information to make that contract?

A. Mr. Van Bokkelen informed me that Mr. Wintemute had agreed to this rate and for me to confirm the space, because Mr. Van Bokkelen did not buy the eggs, had no title to them, but the Association was to ship the eggs, and apparently Mr. Wintemute wanted confirmation to come from our office.

Q. Isn't it a fact that when you talked to Mr. Wintemute on whatever date it was in March, the contract had already been entered into between Mr. Wintemute and Mr. Van Bokkelen, and that you did not have anything to do with the making of the contract?

A. I had nothing to do with the rates.

Q. As you say, you had no discussion with him as to the schedule, all you knew, you were going to ship under this contract, or supply under this contract, certain quantities of eggs moving on the "Hindanger"?

Mr. SAPIRO: What contract?

Mr. GRAHAM: Under the contract that existed between Mr. Wintemute and Mr. Van Bokkelen.

Mr. SAPIRO: What was the contract? We will ask that counsel state to the Court what his contention is as to this contract. I do not believe the wit-

(Testimony of John Lawler.)

ness knows, and I know I could not tell what he refers to by the contract. He is assuming a fact that is not in evidence.

Mr. GRAHAM: I am trying to establish that this witness did not have any contract and never did have any contract. [233]

Mr. SAPIRO: He means that the libelants did not ship eggs and did not pay for the shipment because it was Mr. Van Bokkelen's contract.

Mr. GRAHAM: I do not mean anything of the kind.

Mr. SAPIRO: What do you mean?

The COMMISSIONER: Read the question.

(The last question was repeated by the reporter.)

Mr. GRAHAM: This witness has testified that on a certain date in March he rang up Mr. Wintemute and confirmed a contract. He knows just as well, if not better than I do, what the contract was. If he confirmed it, it indicates that the contract had been entered into between Mr. Wintemute and Mr. Van Bokkelen.

Mr. SAPIRO: You know that contracts are made on a confirmation; even admiralty contracts are made that way.

The COMMISSIONER: Was that his testimony?

Mr. GRAHAM. Yes.

The COMMISSIONER: I will allow the question.

Mr. GRAHAM: Q. Do you understand what I mean?

A. I do not believe I do.

(Testimony of John Lawler.)

Q. Your confirmation with Mr. Wintemute was a confirmation that you were going to supply the eggs on the shipment: Is that a fact? A. No.

Q. It is not? A. No.

Q. Now did you have anything to do with any other shipments which were made to South America of eggs in 1930, you personally? A. No.

Q. You did not have anything to do with the shipment made on the McCormick line? A. No.

Q. Did you have any contract with McCormick at all—You mentioned having had negotiations with McCormick?

A. Yes, I talked to Mr. Bybee at different times. [234]

Q. On what ship did you move eggs on the McCormick line to Buenos Aires?

A. Our association did not move any, we did not ship.

Q. Your discussion with Mr. Bybee was then of a general nature; it did not result in any business?

A. That is correct.

Q. Other than this one conversation in March and possibly a conversation during the first of the year in January, you had no other contact with Mr. Wintemute, or the General Steamship Corporation, in connection with this shipment of eggs?

A. Not that I recall.

Mr. GRAHAM: That is all.

Redirect Examination.

Mr. SAPIRO: Q. That is you directly, had no contact? A. No.

(Testimony of John Lawler.)

Q. But you knew the contact that Mr. Rother had?

A. If I might go to some length in answering this question——

Mr. GRAHAM: Just a minute.

Mr. SAPIRO: Q. Just answer the question; you knew the contact that Mr. Rother had?

A. Yes, absolutely.

Q. And that Mr. Benjamin had? A. Yes.

Q. In this letter of March 10, 1930, you make this statement: "It appears that the steamship company as represented, by Mr. Wintemute, was very anxious that the space be sewed up today. Therefore, space for ten thousand to fifteen thousand cases has been definitely reserved." To what date did you refer?

A. The date of the writing of that letter, March 10.

Q. When do you say it was reserved? When was it reserved? A. That day.

Q. That day? A. Yes, space was reserved absolutely that day, was confirmed that day.

Q. On March 10? A. Yes.

Q. When you referred to the steamship company you are referring to this Westfal, Larsen line, represented by the General Steamship Corporation?

A. Yes. [235]

Q. That refers to the steamship "Hindanger"?

A. Yes.

Mr. SAPIRO: We would like to offer this entire

(Testimony of John Lawler.)

letter in evidence and ask that it be marked Libelants' exhibit next in order.

Mr. GRAHAM: I do not think that this letter has anything to do with this case. This was used to refresh this witness' recollection of a telephone conversation, and it does not mention a telephone conversation any place. This letter represents certain impressions and conclusions this witness came to at that time. It has no bearing whatsoever on the case. Now, as a matter of fact, it says in this letter particularly that the space was reserved on Saturday, which was the 8th of March.

Mr. SAPIRO: Will you show me where it was?

Mr. GRAHAM: "It appears that the steamship company as represented by Mr. Wintemute, was very anxious that the space be sewed up today. Therefore, space for ten thousand to fifteen thousand cases has been definitely reserved. Swift is also anxious to get space. Mr. Van Bokkelen told me Saturday night that Mr. Wintemute had spoken to him and that his line would handle the entire shipment." Obviously if Mr. Bokkelen had been told by Mr. Wintemute that his line, the Westfal Larsen line, was to handle the entire shipment on Saturday, the reservation refers to the previous talk on the Saturday that it was made.

Mr. SAPIRO: Let the letter be the best interpretation of what it refers to. As long as counsel has limited a portion of the letter, we are entitled to have the whole letter in.

(Testimony of John Lawler.)

Mr. GRAHAM: The only purpose of the examination was as to whether Mr. Lawler had this telephone conversation with Mr. Wintemute, as he said he did, and he does not say he had any telephone conversation.

Mr. SAPIRO: It certainly does.

The COMMISSIONER: I do not think the letter is material and [236] I will exclude it. It may be marked Libelants' Exhibit 1 for identification.

(Marked Libelants' Exhibit 1 for Identification, letter of March 10, 1930.)

Mr. SAPIRO: Mr. Van Bokkelen, what was his place in the picture? Was he a possible purchaser of these eggs?

Mr. GRAHAM: I think that this witness should not be led on a question of what Mr. Van Bokkelen's position is in this case.

Mr. SAPIRO: This is absurd.

Mr. GRAHAM: It may be absurd, but I contend that you can not ask this witness leading questions.

Mr. SAPIRO: There is a stipulation here that the libelants were the owners and shippers of these eggs.

Mr. GRAHAM: The bill of lading would establish it even if we did not stipulate it.

Mr. SAPIRO: That is probably why you stipulated to it.

The COMMISSIONER: What is Mr. Van Bokkelen's position?

A. Mr. Van Bokkelen's firm was to sell the eggs in the Argentine.

(Testimony of John Lawler.)

Q. He is not a member of the Poultry Producers of Central California? A. No.

Mr. SAPIRO: Q. Did he have any authority to make a contract with you? A. No.

Mr. GRAHAM: That is trying to establish something that can not be established by this witness, and I move to strike out the answer.

The COMMISSIONER: I will let the answer stand.

Mr. SAPIRO: Q. Did Mr. Van Bokkelen convey to you his conversation with Mr. Wintemute?

A. Yes, he did.

Q. Did he convey to you the details as to rates?

A. Yes.

Q. I understood you to say on your cross examination, your confirmation, as you gave it on that date, was based on the information [237] that had been conveyed to you from these various sources?

A. Yes.

Q. Both as to the rates and time of sailing and all these other factors? A. Yes.

Q. That sailing date, as I understand it, at that time had been fixed about the first part of April?

A. The first or second of April, it seems to me, right around the first part of April.

Q. You knew that at the time you made this confirmation? A. Yes.

Recross Examination.

Mr. GRAHAM: Q. Is it not a fact that your conversation with Mr. Wintemute was as to the sup-

(Testimony of John Lawler.)

ply of the eggs under the contract which had already been made? A. No.

Q. You knew this was a ship carrying general merchandise to South American ports?

A. I knew it was a refrigeration ship.

Q. That is all you know. You had no experience, in other words, in the traffic or transportation end of this business at all?

A. I had a very unfortunate experience.

Q. I am talking about you.

A. I am answering, we had some very unfortunate experience with the "Gothic Star" on account of the delay, to the Argentine.

Mr. SAPIRO: Q. You knew that this was a refrigeration ship, didn't you? A. Yes.

Q. You knew that it went on regular schedule, didn't you? A. Yes.

Mr. GRAHAM: I object to that and move to strike out the answer. This witness has already testified that he did not know anything about the transporation end of this business.

Mr. SAPIRO: He did not testify to that at all.

A. You misunderstood me. I am not a traffic man, but I have some general knowledge of movements.

The COMMISSIONER: I will let it stand.

Mr. SAPIRO: Q. As a matter of fact, a refrigeration ship, so far as your experience of shipping goes, travels on regular sched- [238] ules, differing from general cargo ships, does it not?

(Testimony of John Lawler.)

Mr. GRAHAM: I object to that unless some foundation is laid. This witness has testified the only experience he had with refrigeration ships was the "Gothic Star".

A. You misunderstood me.

Mr. SAPIRO: You asked him whether it shipped to South America.

The COMMISSIONER: You will have to establish a foundation, that he is qualified.

Mr. SAPIRO: Q. Do you ship eggs to New York?

A. We ship eggs by refrigerator boat every two weeks to New York and we ship to Central America every two weeks.

Q. Do you ship to Europe by refrigeration?

A. Yes.

Q. How many cases of eggs have you shipped to New York in a year, approximately?

A. From fifty thousand up to two hundred thousand.

Q. Cases of eggs? A. Yes.

Q. Your organization ship? A. Yes.

Q. Have you been doing that since you were the general manager, every year?

A. Yes. We are the largest exporters of eggs to Central America in the United States.

Q. Those are sent by refrigeration ships?

A. Yes.

Q. You know that the refrigeration ships operate on a general schedule, or do they operate on a regular schedule, different from general cargo-carrying ships?

(Testimony of John Lawler.)

A. A regular schedule. We have to have the eggs there at the time they are scheduled to arrive.

Mr. GRAHAM: I move to strike out the answer as a conclusion of this witness. I don't think this witness is qualified to testify to the schedule of any ship, let alone any refrigeration ship.

Mr. SAPIRO: I think he is qualified to testify, and I think the Court can take judicial notice of it.

The COMMISSIONER: The objection goes to the weight of it, and I will allow it to stay in. [239]

Mr. SAPIRO: That is all.

Mr. GRAHAM: Q. What ship did you ship goods to the East Coast on?

A. I don't remember. The Robert Dollar line is equipping some boats. I don't know if we have any shipments on the Dollar line.

Q. What ships have you used in the Central American trade?

A. The United Fruit Company boat and one other line.

Q. What is the other line?

A. I can't remember, I would have to refresh my memory on that.

Q. The Panama Mail?

A. I don't think the Panama Mail would take shipments there.

Q. Your experience then on the vessels to Central Ameirca, and to the East Coast, Atlantic Coast, has been passenger vessels rather than freight vessels?

(Testimony of John Lawler.)

A. No, we shipped into Peru and Chile on the McCormick line for several years.

Q. And the McCormick line vessels are what you would call vessels running on regular schedule, are they?

A. What shipments we have had have gone very satisfactory to schedule.

Q. What do you mean by regular schedule?

A. The time they are supposed to leave and time they are supposed to arrive.

Q. The time they leave and get there?

A. Yes, within a few days.

Q. That has been your experience on the McCormick South American line?

A. It has been our own personal experience, yes.

Q. Other than the McCormick vessels, the other vessels that you shipped eggs on has been on passenger vessels, that is Panama Pacific, the United Fruit Boats, and that other boats you used?

A. I don't know whether you would call those primarily passenger boats. All the freight boats carry some passengers.

Q. Do you know any distinction between the question of regularity of schedules on the vessel that has refrigeration and one that has not?

A. As to a refrigeration boat, handling perishables, it [240] has always been my understanding it made quicker time and more dependable time, not like a tramp steamer that is here, there and somewhere else.

(Testimony of John Lawler.)

Q. We are talking about regularity of schedules of refrigeration vessels.

Mr. SAPIRO: I think he has answered the question.

Mr. GRAHAM: Q. On what do you base that statement, what has been your general experience in connection with those with and without refrigeration, as to whether they do or do not make faster time?

A. From practical experience. On some thing we ship through the canal by other lines rather than refrigeration lines, we do not place any dependence on when they are going to arrive, we will allow for a difference of ten or twenty days or something of that kind, or if we are getting a bran from the Argentine, we do not rely on the making of prompt delivery, we allow for some little time, but when we ship by refrigeration boat, the schedule, the sailing time, is the all-important thing.

Q. The mere fact, then, that a ship has refrigeration, in your mind, requires it to maintain a different schedule than if it has not refrigeration?

A. When it consists of perishable products it is our belief that it should recognize its schedule, and usually does; that has been our experience with the McCormick line too. My personal experience with the McCormick line has been quite satisfactory. There has been some slight delay, but my recollection is, it has not been serious.

Q. So your experience with the McCormick line

(Testimony of John Lawler.)

has been that it has maintained the schedule as suggested to you?

A. I did not say that it had. I say our experience has been——

The COMMISSIONER: I think you said, quite satisfactory.

A. From my own experience, but I did not go into the regular schedule, because I have not refreshed my memory, it has been [241] at least several years ago.

Mr. SAPIRO: I understand, Mr. Graham, from Mr. Schulz, that it was stipulated that this was sent to the Pacific Egg Producers in the regular course of business?

Mr. GRAHAM: I could not stipulate to that, I do not know.

Mr. SAPIRO: Q. This came from the records of the Pacific Egg Producers, that is Libelants' Exhibit 1?

A. Yes, I took it out of the Pacific Egg Producers' file.

Q. This document that I am showing you here, from the General Steamship Corporation, was that received by the Pacific Egg Producers?

A. That was in the Pacific Egg Producers' file also.

Mr. SCHULZ: I believe you said you were agreeable to stipulating that was Mr. Riali's signature?

Mr. GRAHAM: Yes.

Mr. SAPIRO: We offer that in evidence.

(Testimony of John Lawler.)

Mr. GRAHAM: What is this offered for?

Mr. SAPIRO: The special purpose is to show notification of the readiness to load, dated April 4, 1930.

Mr. GRAHAM: This is offered as notification that the ship would be ready to load about April 4?

Mr. SAPIRO: Yes.

Mr. GRAHAM: That is the only purpose?

Mr. SAPIRO: Yes.

Mr. GRAHAM: I have no objection to it being offered for that limited purpose.

(The document was marked Libelants' Exhibit 3.)

Mr. SAPIRO: That is all.

Mr. GRAHAM: That is all.

Mr. SAPIRO: Libelants will rest. [242]

R. S. WINTEMUTE,

recalled for the respondents:

Mr. GRAHAM: At this time, your Honor, we will offer the depositions of Jens Hansen and Amund Utne, the original of which is on file in the clerk's office.

The COMMISSIONER: They may be admitted.

Mr. GRAHAM: Q. Where do you live, Mr. Wintemute? A. Burlingame.

Q. You are vice president and in charge of the traffic of the General Steamship Corporation?

A. Yes.

Q. How long have you been employed by that

(Testimony of R. S. Wintemute.)

company? A. Practically twelve years.

Q. Previous to that where were you employed?

A. I was employed in the Union Steamship Company of New Zealand and the Canadian Australian Royal Mail Line in Vancouver, B. C.

Q. How long were you with the Union Steamship Company? A. Twelve years.

Q. During the past 24 years then, you have been in the steamship business? A. Yes.

Q. Have you been devoting your attention in the steamship business to the traffic end of that business during all that time? A. Yes.

Q. How long have you been in charge of the South American business of the General Steamship Corporation? A. Since 1920.

Q. That is, for the last twelve years?

A. The last twelve years.

Q. Are you familiar with the customs and practices of the shipment of goods to and from the Pacific Coast of North America to the east coast of South America? A. Yes.

Q. Are you familiar with the shipment of eggs, which is the subject of this litigation? A. Yes.

Q. Referring specifically to the shipment that was made on the "Hindanger", will you, in your own words, describe the conditions [243] leading up to that shipment and the agreements that were made?

Mr. SAPIRO: We will object to that as immaterial, irrelevant and incompetent, an improper method of examination. Counsel just finished a

(Testimony of R. S. Wintemute.)

short time ago, objecting to any examination except by question and answer.

Mr. GRAHAM: I will withdraw the question.

Q. Are you acquainted with Mr. Walter Van Bokkelen, of Buenos Aires? A. Yes.

Q. How long have you known Mr. Van Bokkelen? A. The last five or six years.

Q. What is his business?

A. His business is general importing and exporting business, principally between the Atlantic Coast and the River Platte.

Q. The River Platte would include Buenos Aires? A. Yes.

Q. Did you have a meeting with Mr. Van Bokkelen in connection with a shipment of eggs on the "Hindanger" at any time prior to the shipment?

A. I did.

Q. When was that meeting and where?

A. March 8th, 1930 in our office, 240 Battery street.

Q. Prior to that time had you had any negotiations with the libelants or representatives of the libelants in this case in connection with a shipment of eggs? A. Yes, I had.

Q. You heard the testimony given that there was a meeting in your office on the 15th of February?

A. Yes.

Q. You were present at that meeting? A. Yes.

Q. Do you remember who else was present from the General Steamship Corporation or Westfal, Larsen Company?

(Testimony of R. S. Wintemute.)

A. I believe that Captain Petersen, to the best of my recollection was there, representing Westfal, Larsen Company line.

Q. Had you had any previous meetings with the libelants or their representatives?

A. Yes, I had. [244]

Q. About when were those previous meetings?

A. In checking over my records, and my memory, I had meetings right along at various times, but the first meeting, to my knowledge, was the latter part of January or early in February.

Q. With whom were those meetings?

A. Mr. Benjamin, a representative of the egg concerns.

Q. As a result of those meetings was any cargo booked for shipment on any of your vessels?

Mr. SAPIRO: We will object to that as leading and calling for the conclusion of the witness as to what was a result of the meetings. The only thing he can say is, what happened.

Mr. GRAHAM: All right, I will withdraw the question.

Q. What happened as a result of those meetings?

A. Nothing happened.

Mr. SAPIRO: We will ask that that answer go out as not responsive. It is obvious that the witness is drawing his conclusion, and the witness should be instructed to state what was said.

Mr. GRAHAM: I think the witness thoroughly knows whether anything happened in connection

(Testimony of R. S. Wintemute.)

with the shipment of eggs over vessels that he operated.

Mr. SAPIRO: All right, if you are satisfied to leave that answer in, we are and we will take care of it on cross examination.

Mr. GRAHAM: Q. Is Mr. Reali in the employ of the General Steamship Corporation? A. Yes.

Q. Is he one of your assistants? A. Yes.

Q. Do you remember what the rates on eggs moving to Buenos Aires from San Francisco and Seattle in the latter part of 1929 and the early part of 1930?

A. The tariff rate was $1.50 per case.

Q. Did you move any eggs on that basis?

A. No.

Q. What was the first shipment of eggs that you booked during 1929 and 1930 that you contracted to carry?

A. On the motorship "Villanger." [245]

Q. Was that in the nature of an option or was that a contract? A. It was a contract.

Q. Made with whom?

A. Swift & Company of Portland, Oregon.

Q. For how many cases of eggs?

Mr. SAPIRO: We will object to that as immaterial, irrelevant and incompetent. I don't know where that has any relevancy.

Mr. GRAHAM: I think it has relevancy in this respect, that Mr. Wintemute will testify as to all the negotiations he had in connection with eggs, and

(Testimony of R. S. Wintemute.)

the libelants' witnesses have testified as to certain conversations concerning things that Mr. Wintemute is purported to have said and I intend to show that he made no such representations as he is purported to have made.

Mr. SAPIRO: How does anything he told Swift & Company have any connection with these libelants?

Mr. GRAHAM: If there is an objection I will withdraw the question.

The COMMISSIONER: All right.

Mr. GRAHAM: This conversation that you had in your office in February, 1930, with the representatives of the libelants was about what ship, Mr. Wintemute?

A. About the motorship "Villanger."

Q. Did you have a general discussion at that time?

A. We had general discussion at that time, having to do with the motorship "Villanger" in particular.

Q. At that meeting on the 15th of February did you reach any conclusion, Mr. Wintemute, any contract for the shipment of eggs on the "Villanger"?

A. No, there was no contract made.

Q. Were there any eggs shipped thereafter on the "Villanger" by these libelants or either of them? A. No.

Q. What makes you think it was the "Villanger" that you were talking about at the meeting of February 15th, rather than any [246] other ship?

(Testimony of R. S. Wintemute.)

A. My records will show that.

Q. I will show you a copy of a cable dated February 15, 1930, and ask you to whom that cable was sent and by whom?

A. It was sent by the General Steamship Corporation as agent, to their principals in Bergen, Messrs. Westfal, Larsen & Company, cable address, Westfal Larsen, Bergen.

Q. Will you read that cable and tell us, after refreshing your recollection, what the situation was, following the meeting on February 15 as to the shipment of eggs to Buenos Aires by these libelants?

Mr. SAPIRO: We will object to the reading of the cable, on the ground it would be hearsay, being a communication between two parties—

The COMMISSIONER: You did not mean for him to read it into the record?

Mr. GRAHAM: No, I am not asking him to read it into the record.

The COMMISSIONER: You mean to read it to refresh his recollection?

Mr. GRAHAM: Yes.

Mr. SAPIRO: I don't think he is entitled to offer the memorandum.

The COMMISSIONER: He has not offered it in evidence.

Mr. SAPIRO: He is not entitled yet to offer it to the witness.

Mr. GRAHAM: I think I am.

Mr. SAPIRO: The witness might have an independent recollection.

(Testimony of R. S. Wintemute.)

The COMMISSIONER: Q. Have you any independent recollection aside from that?

A. Very slight. These are records that I have to refresh my memory from.

Mr. SAPIRO: Q. Did you get up that cable?

A. I did.

Q. Did you check it when it was sent?

A. I could not say as to that; sometimes I do and sometimes I do not. [247]

Q. Did you check that cable when it was sent?

A. I could not swear to it.

Q. You don't know?

A. I don't know, I could not swear to it.

Q. Where is the original?

A. It is in the cable office, probably.

Mr. GRAHAM: If you object to the introduction of the copy, I will get the original, if you wish.

Mr. SAPIRO: If he does not know whether he checked it or not, I object to his reading it.

Mr. GRAHAM: Your objection goes to the fact that it is a copy and not the original?

Mr. SAPIRO: You do not need to put the words in my mouth. I will state my own objection.

Mr. GRAHAM: I wish you would.

The COMMISSIONER: Q. Would you say that is a true copy?

A. That is a true copy of a cable that was sent from my office.

Q. You dictated it? A. Yes.

The COMMISSIONER: You may use it to re-

(Testimony of R. S. Wintemute.)

fresh your memory. It was sent on the date which is given there?

A. Yes, February 15. The situation at that meeting developed that both the McCormick Steamship Company and ourselves had quoted a rate of $1.20 per case on eggs in order to meet the New York rate, and we were informed by the Egg Producers, Mr. Benjamin, at the meeting, that on account of the reduction in rate of the New York line we would have to quote a lower rate, of approximately 40 cents per cubic foot in order to enable them to do business. We had already made a booking of eggs with Swift & Company in Portland on the "Villanger" at a rate of $1.20, but we had to obtain the authority of our owners to make a reduction to 40 cents per cubic foot as requested by the Pacific Egg Producers, if they expected to do any business, as they informed us, on the "Villanger."

Mr. GRAHAM: Q. At that meeting the discussion was as to the [248] rate applicable on the ship which was contemplated for the "Villanger"?

Mr. SAPIRO: If your Honor please, we object to that as leading, as highly improper. Let him state what was said.

The COMMISSIONER: Read the question.

Mr. GRAHAM: I will withdraw the question if there is any objection. I do not want to get into a dispute as to whether it is leading or not.

Mr. SAPIRO: There certainly could not be any dispute about that.

Mr. GRAHAM: Q. Will you state what was

(Testimony of R. S. Wintemute.)

said at that meeting with respect to the shipment of eggs on the vessel on which it was to go?

A. The discussion, as I remember it, not only from my records, but from my memory, centered primarily on the possibility of the Pacific Egg Producers making a shipment of eggs to the Argentine on the motorship "Villanger," and the whole negotiations centered upon the question of rates.

Q. At that time was the "Villanger" in a position to be able to load eggs had you been able to conclude negotiations?

A. She was.

Q. At that time did you or anyone else acting for the respondent in this case, make any representations to the libelants or their representatives that the "Villanger" or the "Hindanger" would make the voyage from San Francisco to Buenos Aires in 35 days?

A. I can't recall that it was ever brought up.

Mr. SAPIRO: We will ask that that go out as a leading question. Ask him what was said. This is their witness.

Mr. GRAHAM: I will withdraw the question.

The COMMISSIONER: It may go out.

Mr. GRAHAM: At that time, Mr. Wintemute, at the February 15 meeting, what was said in connection with the length of voyage of the "Villanger," if you recall?

A. I can't recall that it was ever brought up. [249]

(Testimony of R. S. Wintemute.)

Q. Did you or did you not make any representations that the vessel would make the voyage in 35 days?

Mr. SAPIRO: We will ask that that go out as leading. Ask him what was said.

Mr. GRAHAM: I do not think it was. I have already asked him what was said.

Mr. SAPIRO: If he can not recall what was said, then he can not state whether or not anything was said. Do you mean in connection with the "Villanger"?

Mr. GRAHAM: Q. Was anything said in connection with the "Villanger" about the time of the voyage?

A. I really can not remember that anything was said about the time of the voyage.

Q. At that meeting did you have any discussion as to the time of the voyage of the "Hindanger" from San Francisco to Buenos Aires?

A. To the best of my recollection, no.

Q. I show you a sailing schedule which has already been introduced in evidence as Libelants' Exhibit No. 1, and ask you when that was sent out. I think you have already testified to this, but at the risk of repetition I will ask it again.

A. In November, 1929.

Q. At that time will you tell me when the "Villanger" and "Hindanger" respectively were scheduled to sail from San Francisco?

A. The "Villanger" was scheduled to sail from San Francisco on February 12, and the "Hindanger" from San Francisco March 18.

(Testimony of R. S. Wintemute.)

Q. This was November, 1929? A. Yes.

Q. Can you tell me whether, at the time this schedule was sent out, in November, 1929, the position of those two vessels were such that the dates indicated were your reasonable expectation?

A. Yes, they were.

Q. Does that also apply as to the arrival dates of the two vessels in South America and particularly at Buenos Aires?

A. Yes.

Q. No schedules similar to this were subsequently sent out prior [250] to the sailing of the "Hindanger"?

A. No.

Q. Let me ask you, are the "Hindanger" and "Villanger" general cargo vessels or not?

Mr. SAPIRO: We will ask that that go out as a conclusion of the witness.

Mr. GRAHAM: All right, I will withdraw it.

Q. What kind of vessels are the "Villanger" and "Hindanger"?

A. The "Villanger" and "Hindanger" are motorships built to carry general cargo as well as lumber and other products for shipment in the trade between the Argentine, Brazil and the Pacific Coast.

Q. I think you testified they had some refrigeration space also?

A. Yes.

Q. On this schedule I call your attention to the line which reads: "Rosario, Santa Fe and other ports, as inducements offer." Will you tell the Court what is meant by that statement?

(Testimony of R. S. Wintemute.)

Mr. SAPIRO: We will object to that as something that does not need explanation. Does your Honor think you need expert testimony on the interpretation of that language?

The COMMISSIONER: That simply means freight, doesn't it?

Mr. GRAHAM: If your Honor does not need an explanation of what that means, I am content to let it stay as it is.

The COMMISSIONER: I imagine it means freight. I don't know. I would like to have an explanation of it.

Mr. GRAHAM: Q. What is meant by that?

A. It means that the steamship company is called upon at times to accept freight for other ports en route in that particular trade shown on the schedule as being the major ports at which we accept cargo.

Q. Do you show all the ports of call of the respective vessels on that schedule?

A. If we know them at the time. [251]

Q. When you made up that schedule in November, 1929, did you know all ports of call via the "Villanger" or Hindanger"? A. No.

Q. Had you booked any cargo at that time for the "Hindanger"?

A. To the best of my knowledge, no.

Q. What determines the port to which the vessel goes, and the "Hindanger" in particular, which would go on a voyage such as that?

A. The cargo which is offered.

Q. Can you tell me whether the "Hindanger"

(Testimony of R. S. Wintemute.)

is or is not a general cargo vessel engaged as a common carrier?

Mr. SAPIRO: We will object to that as calling for the conclusion of the witness. The Court can decide that from the testimony, as to the nature of the boat.

The COMMISSIONER: Yes, I think so. I will sustain the objection.

Mr. GRAHAM: Q. What is the nature of the cargo that the "Villanger" and "Hindanger" carry, and carried on this voyage?

A. Lumber, petroleum products, eggs, dried fruit, canned goods and sundry general merchandise.

Q. Do you or do you not hold yourselves out as common carriers for all merchandise offered for carriage in the service? A. We do.

Q. Now going back to the meeting of February 15, after that meeting broke up, did you have any further meetings from then on until the time of the shipment of these goods on the "Hindanger", with the libelants or their representatives?

A. I can't say that we had any further meetings specially in connection with the "Hindanger" because the "Hindanger" was not the point of the meeting at the time.

Q. You testified that your meeting on the 15th of February related to the "Villanger". Did you close any shipments for the libelants on the "Villanger" at all? A. No.

(Testimony of R. S. Wintemute.)

Q. As time developed did the position of the "Hindanger" and [252] "Villanger' as far as time of departure and time of arrival at the other end, remain the same?

A. No, they changed from time to time.

Q. What was the nature of the change of those positions?

A. They became delayed in their position.

Q. Do you know whether any options were given to these libelants for shipment of eggs on the "Villanger" or "Hindanger"?

A. We offered the space for a minimum of 12,000 cases on the motorship "Villanger" in Los Angeles, with the McCormick Steamship Company, who gave them an option of 6000 cases in their steamer "West Iris" which was the basis of our agreeing to meet their requisition for 40 cents a cubic foot rate.

Q. Were any shipments made on that 40-cent rate on the "Villanger"?

A. Swift & Company, as I previously stated.

Q. Were any shipments made by these libelants on the "Villanger"? A. None.

Q. Following the reduction of the rate to 40 cents for the "Villanger" was there a subsequent reduction of rates on the "Villanger?" A. Yes.

Q. When was that reduction in rates made, if you know?

A. May I make a correction to that last answer? I do not think I got your question right. May I change that now?

(Testimony of R. S. Wintemute.)

Q. What is the fact?

A. I am trying to recall from memory the best I can.

Q. What is the fact? A. No.

Q. That is, these libelants were not offered any rate reduced from 40 cents for shipment on the "Villanger"?

A. As far as I can remember, no.

Q. At the time that you were working with these libelants for shipment of eggs on the "Villanger", were you working with anybody else for a shipment of eggs on the "Villanger"? [253]

Mr. SAPIRO: I do not believe that would be material. If it has any relevancy I would not object to it.

Mr. GRAHAM: I will withdraw it. Q. Now coming to the "Hindanger" do you recall what your first conversation was with these libelants or their representatives in connection with the shipment of eggs on the "Hindanger"?

A. I believe my first conference with the egg producers in connection with the shipment on the "Hindanger" was the conversation had with Mr. Lawler, confirming that he would supply the eggs for which space had been reserved by Mr. Van Bokkelen.

Q. Now when did Mr. Van Bokkelen reserve this space for eggs on the "Hindanger"?

A. On March 8th, 1930.

Q. What makes you think it was March 8th, 1930? A. I have checked over my records.

(Testimony of R. S. Wintemute.)

Q. I will show you a copy of the cable. First of all, do you have any independent recollection of these respective dates without checking your records? A. No, not the exact date.

Q. I will show you a copy of a cable and ask you to whom that cable was sent.

A. The cable was sent to Messrs. Westfall, Larsen & Company, Bergen.

Q. By you? A. By me.

Q. On what date? A. On March 8th.

Q. Referring to what ship?

A. Referring to the "Hindanger."

Q. Will you read that cable to yourself, refresh your recollection and tell me what happened on March 8th in connection with the shipment of eggs on the "Hindanger"?

A. On the morning of March 8th Mr. Walter Van Bokkelen arrived in San Francisco and called on me, stating that he had just come from the East by plane. I had been in telegraphic communication with him and wondered how he got here so soon. He told me that he was now prepared to ship 15,000 cases of eggs on the motorship "Hindanger", that he wanted to give [254] us these eggs to carry out a promise made Mr. Von Erpecom, managing director of Messrs. Westfal, Larsen & Company, made to Mr. Von Erpecom in London, at which time Mr. Van Bokkelen had discussed with Mr. Von Erpecom the possibility of Westfal, Larsen Company allocating to Mr. Van Bokkelen for operation in the Blavin line operated by Mr. Van Bokkelen between

(Testimony of R. S. Wintemute.)

New York and Buenos Aires, the last two of the new ships then being built by Westfal, Larsen Company for the trade between the Pacific Coast and Argentine and Brazil. Mr. Van Bokkelen said he wanted to carry out his promise to Mr. Von Erpecom to give us a shipment of eggs, and accordingly he said he would ship 15,000 cases, that he was arranging with the egg people, the Pacific Egg Producers, to ship the eggs.

Q. At that time, Mr. Wintemute, did you close a contract with Mr. Van Bokkelen or not?

A. Verbally, yes.

Q. Did you agree on the rate? A. Yes.

Q. What did you tell him the expected sailing of the "Hindanger" from Puget Sound to San Francisco would be?

A. We told him that the ship, as near as we could figure then, was expected to sail from Seattle March 24, and from San Francisco, April 4.

Q. At the time you made this representation, to Mr. Van Bokkelen was the vessel in such a position that you could reasonably expect that the representations could be carried out? A. Yes.

Q. Following the making of the contract with Mr. Van Bokkelen for the carriage of these eggs did you have any communication with the Pacific Egg Producers?

A. Yes, on my instruction, Mr. Riali directed a letter to the Pacific Egg Producers, confirming the arrangement with Mr. Van Bokkelen and asking for their confirmation.

(Testimony of R. S. Wintemute.)

Q. Do you know whether Mr. Riali carried out your instructions and communicated with the Pacific Egg Producers? A. I believe he did.

Q. Did you see the letter that was written?

A. I saw the copy. [255]

Q. I will show you a letter dated March 12 and ask you if that is a copy of the letter written by Mr. Riali to the Pacific Egg Producers?

A. That is.

Q. Is that the letter that was written in accordance with your instructions, following the meeting with Mr. Van Bokkelen in which he had made the booking with you in which you asked them to confirm whether they would supply the eggs under the booking? A. Yes.

Mr. GRAHAM: I will offer this as respondent's Exhibit A.

(The document was marked Respondent's Exhibit A.)

Q. Prior to Mr. Reali's writing this letter to the Pacific Egg Producers, following your agreement with Mr. Van Bokkelen, had you had any conversation with the Pacific Egg Producers or the representatives of either or both of the two libelants in connection with this particular shipment?

A. I can not recall any definite conversation, but I know that both Mr. Reali and myself had occasion to confer with the producers of the eggs regarding the quantity they would supply at both Seattle and San Francisco, as we ourselves were rather anxious to have the information in our pos-

(Testimony of R. S. Wintemute.)

session at as early a date as possible.

Q. Did you have any conversation with Mr. Lawler or a representative of any one of these three associations between the time you closed the contract with Van Bokkelen and the time this letter was written on the 12th of March?

A. I can not recall that.

Q. You don't know whether you did or not?

A. No.

Q. Did you ever receive any reply to this letter requesting confirmation that the Pacific Egg Producers would supply the eggs?

A. I have never seen any.

Q. You did not receive any?

A. I did not receive any.

Q. Would you or would you not have been the individual in the employ of the respondent who would have received it?

A. I would have. [256]

Q. Now following the writing of this letter did you or did you not have any conversation with the Pacific Egg Producers or representatives of the two libelants as to whether they would or would not supply the eggs under the contract?

A. Yes, with just what particular party I can not recall, but I know there was some question as to the exact quantity they would supply; to the best of my recollection the Egg Producers told me that they might not be able to supply the total of 15,000 cases, as they were having to check up to find out whether they would be able to supply the

(Testimony of R. S. Wintemute.)

amount, and they might have to fall down something below 15,000 cases, as to which I recall having told them it would be all right.

Q. Did you send the Pacific Egg Producers this document, Libelants' Exhibit 3, on March 18, or cause it to be sent from your office? A. Yes.

Q. Was it ever received back signed? A. No.

Q. Were any other shipments of eggs made on the "Hindanger" besides the eggs which were booked by Mr. Van Bokkelen? A. Yes.

Q. By whom were they made?

A. Swift & Company of Portland.

Q. Did you have any further negotiations with the Pacific Egg Producers, looking to other shipments of eggs, over a further shipment of eggs on the "Hindanger"?

A. We had negotiations with the Washington Cooperative through our Seattle office which I believe covered the booking made by Mr. Van Bokkelen.

Q. What were those negotiations, do you remember?

A. The Washington Cooperative were rather anxious that the ship be delayed, as they were having trouble getting their eggs; they said that if the ship sailed on the 24th from Seattle——

Mr. SAPIRO: Q. Did you have the negotiations?

A. Our Seattle office did.

Mr. SAPIRO: I will ask that the answer go out as obviously hearsay. [257]

A. I had a telegram from them.

(Testimony of R. S. Wintemute.)

Mr. SAPIRO: I don't care what you had.

The COMMISSIONER: It may go out.

Mr. GRAHAM: Q. Did you or did you not receive any telegram in the regular course of business from your Seattle office in connection with this shipment being made by the Washington Cooperative?

A. I did.

Q. What was the nature of this telegram, can you recall?

Mr. SAPIRO: We will object to that as obviously hearsay, a telegram sent between their offices.

The COMMISSIONER: The objection is sustained.

Mr. GRAHAM: Q. Following the booking made by Mr. Van Bokkelen, what was the next time you saw him, if you remember?

A. I can't recall seeing him.

Q. Did you have any further contact with him?

A. I did.

Q. Before the shipment on the "Hindanger" went forward? A. I did.

Q. When was that?

A. I had a conversation with him over the telephone, I remember it very vividly; he phoned me from the St. Francis Hotel.

Mr. SAPIRO: When?

A. The latter part of March.

Mr. GRAHAM: Q. Now if you will, go on and state the conversation.

Mr. SAPIRO: We will object to that as imma-

(Testimony of R. S. Wintemute.)

terial, irrelevant and incompetent. Van Bokkelen is not a libelant in these suits.

The COMMISSIONER: I do not understand the question that was asked.

Mr. SAPIRO: He wants him to testify to some later conversation with Van Bokkelen.

Mr. GRAHAM: I will withdraw that question.

Q. Did you make any contract at all with either of these libelants in connection [258] with the shipment of these eggs other than actually made by the bill of lading?

Mr. SAPIRO: We will object to that as calling for the conclusion of the witness, and leading. That is the question that this Court is going to decide from the facts and circumstances appearing in evidence before it.

The COMMISSIONER: Yes I think so.

Mr. GRAHAM: It seems to me that this witness can certainly answer that question. I would like to have the question read, because I have asked the witness particularly if he made any other contract than as represented by the bill of lading. I appreciate that the question whether the bills of lading did or did not constitute the contract between these parties, is one of the issues before the Court to decide, and I am asking him whether they made any other contracts.

The COMMISSIONER: I think it calls for a conclusion. I think you can ask him if he had any other negotiations.

(Testimony of R. S. Wintemute.)

Mr. GRAHAM: Q. Did you ever have any other negotiations with these libelants than the ones you have already testified to, including a telephone conversation? A. No.

Q. Did you inform these libelants or their representatives, how long the vessel would take to make the voyage from San Francisco and Seattle to Buenos Aires?

A. Do you mean the "Hindanger"?

Q. Yes. As far as I can recollect, no.

Q. Do you know whether the "Hindanger" was delayed prior to sailing from San Francisco and Seattle on the voyage or not?

A. Yes, she was delayed at Vancouver B. C. where she had to undergo drydock repairs.

Q. About how long was she delayed?

A. Approximately six days.

Q. Do you know what the repair bill amounted to?

A. Something around eight thousand dollars. [259]

Q. Did you ever indicate to these libelants or their representatives the date upon which the vessel was to arrive in Buenos Aires or was expected to arrive in Buenos Aires?

A. I can not recall that.

Q. At the time you made the booking for this cargo, and at the time the letter on March 12 was written to the Pacific Egg Producers, do you know how much cargo the "Hindanger" had, or was to carry there? A. No.

(Testimony of R. S. Wintemute.)

Q. Did you know at that time specifically the ports to which the vessel was to go in South America? A. I do not believe so.

Q. Did you know how long it was going to stay at the respective ports at which it did stay?

A. No.

Q. Is it possible, Mr. Wintemute, in a ship of the character of the "Hindanger" in advance to know definitely the date of sailing and arrival in the respective ports?

A. I can say that is practically impossible in the South American trade.

Q. Why is that?

A. On account of conditions at the various ports.

Q. What do you mean by conditions at the various ports? A. The question of labor.

Q. What other conditions are there?

A. The questions of regulations of the various ports that may be changed from time to time, which might affect the loading or discharging of cargo.

Q. This letter of March 12 was written from your office. When did you indicate to the Pacific Egg Producers that the vessel was expected to leave San Francisco?

A. It was expected to leave San Francisco about April 4, to the best of my recollection.

Q. And this letter was dated March 12?

A. March 12.

Q. Subsequent to the writing of that letter, is it my understanding that the vessel was delayed in the north for drydocking? A. Yes.

(Testimony of R. S. Wintemute.)

Q. About how long was that delay?

A. About six days.

Q. You made no representations to the libelants of the approximate time that it would require the "Hindanger" to make the voyage [260] to Buenos Aires?

A. I can not recall it was ever asked me.

Q. You can not recall it was ever asked you?

A. No.

Q. Did you ever tell them about how long it would take to make the voyage?

A. I can't recall that it did.

Q. Do you know how long it took, or had been taking the vessels on the list to make the voyage to Buenos Aires?

A. The records that I have checked up show the ships had been taking anywhere from 36 to 50 days, depending upon cargo and conditions from time to time.

Q. Had any of them made the voyage in 35 days, any of these ships make that trip?

A. I believe they have since then.

Q. I mean before then?

A. I do not think so.

Q. Is there anyone else in the General Steamship Corporation, or in the employ of Westfal, Larsen & Company that you know of, that made any representation to the libelants or their representatives that the vessel would arrive in Buenos Aires at a given time or in a given number of days? A. I don't know.

(Testimony of R. S. Wintemute.)

Q. You don't know of anybody?

A. I don't know of anybody.

Mr. SAPIRO: Q. You don't know if anybody did or not? A. No.

Mr. GRAHAM: Q. Before you reduced the rate on the "Villanger" down to 40 cents, had you been able to get any eggs at all? A. Yes.

Q. I mean with the exception of these Swift eggs—any eggs from these people? A. No.

Q. More especially calling your attention to the fact that you showed the "Hindanger" one day in Montevideo, will you explain that in relation to the time that that schedule was made up, in November 1929?

A. This schedule was made up to give an indication not only of the ports of calling but the approximate sailing and arrival dates, and it was quite reasonable to assume that we might only have cargo to discharge at the various ports which would only take so much time. As far as the "Hindanger" being shown for only one day at Montevideo, it was quite as reasonable to assume that [261] this would happen. We had no cargo booked for Montevideo at that time, and we never knew what we would have. We really wanted to show that the vessel would call at these ports.

Q. And other ports as inducements offered, as indicated in the schedule?

A. And other ports, as inducements offered.

Q. In your experience prior to the shipment of the eggs on the "Hindanger" had any of your ves-

(Testimony of R. S. Wintemute.)

sels stayed at Montevideo as short a period as one day? A. I have not checked it over.

Q. You don't know? A. I don't know.

Q. Did you or did you not give any options to these libelants for shipment of eggs on the "Hindanger"? A. Yes, I believe I did.

Q. This letter of January 27 has already been introduced by Mr. Sapiro. I will ask if it is an option or not.

Mr. SAPIRO: We submit that the letter speaks for itself.

Mr. GRAHAM: It shows on the face of it it is an option.

Mr. SAPIRO: We are not disputing what the letter may be, but the letter I think speaks for itself.

The COMMISSIONER: Yes, I think the letter is the best evidence.

Mr. GRAHAM: The letter shows on its face it is an option. Is that one of the options you had given to these libelants? A. Yes.

Mr. SAPIRO: We will ask that the answer go out as a conclusion of the witness. I think the letter speaks for itself as to what it is.

The COMMISSIONER: Yes, it is the best evidence. It may go out.

Mr. GRAHAM: Q. Were any of these options that you say that you gave to the libelants exercised for shipment on the "Hindanger"? A. No.

Mr. SAPIRO: We will object to that as calling for the conclu- [262] sion of the witness.

Mr. GRAHAM: That is not a conclusion. He

(Testimony of R. S. Wintemute.)

has testified that options were given and he certainly would know whether they were exercised.

Mr. SAPIRO: No, it is not. It is up to him to testify to the facts and then the Court can draw its conclusion from the fact.

The COMMISSIONER: I think that is permissible. I will allow it.

Mr. GRAHAM: Q. Mr. Wintemute, does the manifest show the general nature of cargo carried on the "Hindanger" and the ports to which the vessel went, and the amount of cargo discharged at each port? A. The cargo loaded and discharged.

Q. At the various ports?

A. At the various ports as shipped from here at the time.

Mr. GRAHAM: May it please your Honor, Mr. Schulz called upon me for a list of bookings. I told him that I had the manifest of the ship and I could produce the manifest if he wanted it for any purpose. It shows the ship to have been a general ship engaged in the carriage of commodities listed in the manifest.

Mr. SAPIRO: We will accept and examine the manifest, but without the acceptance of the observation as to the nature of the ship.

Mr. GRAHAM: I think I will introduce it in evidence.

The COMMISSIONER: All right.

Mr. SAPIRO: No objection.

The COMMISSIONER: This is the manifest on this voyage?

(Testimony of R. S. Wintemute.)

Mr. GRAHAM: Yes.

The COMMISSIONER: It may go in as Respondent's Exhibit B.

Mr. GRAHAM: At this time may we have a stipulation, the customary stipulation, that the exhibits may be withdrawn by either side?

Mr. SAPIRO: Yes. [263]

Mr. GRAHAM: In answer to a request made for a booking list, the only thing available with the exception of the actual manifest is the so-called loading list, and I produce this. There are no other documents that I know of available covering this.

Mr. SCHULZ: It is nothing which shows the date on which bookings were made, that is in advance of the loading?

Mr. GRAHAM: No. The purpose of that loading list, I might explain, is to indicate approximately the amount of cargo that the vessel is to have for the respective ports, and is of course subject to change. I will ask the witness a question about it.

Q. Mr. Wintemute, I show you what purports to be a loading list, produced in answer to a request of counsel for the libelants——

Mr. SAPIRO: Just a minute. We will ask that portion go out, as that is not a list produced in answer to our request.

Mr. GRAHAM: What was your request?

Mr. SAPIRO: We wanted to know if you had the booking ledger. I have no objection to asking questions about the list but I do not want you to put in an observation about it.

(Testimony of R. S. Wintemute.)

Mr. GRAHAM: Q. I will ask you what that is.

A. This is a loading list of the motorship "Hindanger", voyage 2.

Q. What is the date of that?

A. Issued March 17.

Q. Does it show the cargo that was to be loaded on the vessel that you knew it to be at that time?

A. Yes.

Q. Are the goods which thereafter were shipped on the "Hindanger" indicated on that list?

A. Yes.

Q. That is not the plan list that was made up?

A. No.

Q. For whose information is that made up?

A. For the information of our agents at the various loading ports, also the master and officers of the vessel.

Q. Is that subject to change as cargo is offered or withdrawn? A. Yes. [264]

Mr. GRAHAM: I think that is all, except this, there is a stipulation in this case which is already in that carries with it an ad from the "Guide", and here is the original, and we will just offer it. The stipulation has a photostatic copy of the section of the "Guide". We offer the whole copy, that is the one from which the copies were made.

The COMMISSIONER: The loading list will be marked Respondent's Exhibit C and the "Guide" marked Respondent's Exhibit D.

(Thereupon by consent an adjournment was taken until Tuesday, May 17, 1932, at 2 p. m.)

[Endorsed]: Filed Oct. 22, 1932. Walter B. Maling, Clerk. [265]

[Title of Court and Cause Nos. 20336-L and 20337-S.]

Friday, May 20, 1932.

The COMMISSIONER: You may proceed. [266]

Mr. GRAHAM: I have a couple of more questions on direct, of Mr. Wintemute.

R. S. WINTEMUTE,

recalled by respondents, previously sworn:

Direct Examination (continued)

Mr. GRAHAM: Q. Mr. Wintemute, did Mr. Benjamin, in any discussion you had with him ever point out to you that the eggs which he was considering shipping should be delivered in Buenos Aires about May 1st? A. No, sir.

Mr. SAPIRO: We will object to that as calling for the conclusion of the witness and ask that the answer go out.

Mr. GRAHAM: That is not a conclusion of the witness. I am asking him if Mr. Benjamin in any

(Testimony of R. S. Wintemute.)

discussion he had with him said that eggs should be delivered in Buenos Aires about May 1st and he said he did not.

The COMMISSIONER: I will allow the answer to stand.

Mr. GRAHAM: Q. Mr. Wintemute, you are familiar, or are you familiar with the general cargo vessels, both of the refrigeration type and non-refrigeration type? A. Yes.

Q. As between the two types of ships is there any difference in the schedules of non-refrigerator or refrigerator ships? A. No, sir.

Q. Did you ever have any discussion with Mr. Benjamin as to his shipping ten to fifteen thousand cases of eggs? A. No, sir.

Q. What was your discussion with him at that time?

A. My discussion with Mr. Benjamin at that time was in connection with the possibility of shipping eggs to Buenos Aires via the Motorship Villanger. The principal item at stake was the question of freight rates. [267]

Q. And what freight rate did Mr. Benjamin want?

A. The first meeting I had with Mr. Benjamin we talked on a rate of $1.20 per case. Mr. Benjamin after that left for Seattle and when he came back he informed us that the New York Line had reduced their rate and he thought we ought to reduce our rate to a basis of 40 cents per cubic foot.

(Testimony of R. S. Wintemute.)

which was the equivalent of approximately 93 cents per case.

Q. Did you ever discuss with Mr. Benjamin a 30-cent rate on eggs? A. No, sir.

Q. When was the question of the 30-cent rate on eggs first mentioned?

A. That was first mentioned by Mr. Van Bokkelen in a telegram he sent us from Kansas City on March 3rd.

Q. Do you remember, without refreshing your recollection, exactly what that telegram stated?

A. The telegram stated——

Mr. SAPIRO: Just a minute. Have you refreshed your recollection by looking at the telegram? A. I have, yes.

Q. So you are not remembering what it stated without having looked at it? A. No, I couldn't.

Mr. SAPIRO: Is that the telegram?

Mr. GRAHAM: No; this is a copy of it.

Mr. SAPIRO: Is that what you refreshed your recollection from? A. Yes.

Mr. SAPIRO: I think I am entitled to examine the memorandum which he used to refresh his recollection. (The document was handed to Mr. Sapiro.) Have you got the original?

Mr. GRAHAM: That is the office copy.

Mr. SAPIRO: Where is the original?

Mr. GRAHAM: I haven't any idea where the original is.

Mr. SAPIRO: You have no idea where the original is?

(Testimony of R. S. Wintemute.)

Mr. GRAHAM: Not the slightest. [268]

Mr. SAPIRO: Well, we will object to any such testimony, because it is shown he has refreshed his recollection from—— Is that the copy from which you refreshed your recollection?

The WITNESS: Yes.

Mr. SAPIRO: We will object to that because it is a copy and we demand the introduction of the original.

The COMMISSIONER: Have you laid the foundation for the absence of the original?

Mr. GRAHAM: I will. I had no idea there was going to be any objection to this. This is one of the telegrams we discussed the other day and we received copies without objection.

Mr. SAPIRO: Oh, no, they are not in evidence.

The COMMISSIONER: Lay your foundation.

Mr. GRAHAM: Q. Mr. Wintemute, I show you a copy of a telegram and will ask you where that came from.

A. That telegram came from Kansas City.

Q. From whom?

A. From Mr. Walter Van Bokkelen.

Q. And is that a copy of the original, which copy you took from your records?

A. That is, certainly.

Q. Pardon me?

A. That is, certainly.

Mr. SAPIRO: We will ask that the answer go out. That isn't any showing as to the original. We don't accept his conclusion.

(Testimony of R. S. Wintemute.)

The COMMISSIONER: What was his answer?

Mr. SAPIRO: He said that is a copy of the original.

The COMMISSIONER: Do you know where the original is?

A. It may be in our office, in our files.

Mr. SAPIRO: Then we went the original.

The WITNESS: You see, when these original wires come in they are all copied off in several copies for the benefit of [269] those who are interested, in that particular department, and that is how I came to have this in our file.

Mr. SAPIRO: That is not your office file?

The WITNESS: That is my office file.

Mr. SAPIRO: That is not the general office file of the General Steamship Company?

The WITNESS: Yes, it is.

Mr. SAPIRO: You say you have the original of that telegram in your office file?

The WITNESS: I expect it is.

Mr. SAPIRO: Then we demand the production of the original.

The COMMISSIONER: Yes, they will be entitled to the original, if it is available.

Mr. GRAHAM: Then I will have to send for it and then we will pass that matter.

Q. Mr. Wintemute, I will again ask you what is your present recollection of the first time you discussed a 30-cent rate on eggs and with whom did you have any discussion in that connection?

Mr. SAPIRO: Well, if he is asking it again that

(Testimony of R. S. Wintemute.)

is cross-examining the witness.

Mr. GRAHAM: No, it is not anything of the kind. I am asking the witness what his present recollection is.

The COMMISSIONER: He may answer.

The WITNESS: My recollection was that upon receiving a telegram from Mr. Walter Van Bokkelen from Kansas City we communicated with our competitors, the McCormick Steamship Company and had them agree to a 30-cent rate on eggs with the understanding that any engagement we made might also include eggs for one of their ships, and then the next time the 30-cent rate [270] came into question at my first conversation with Mr. Walter Van Bokkelen on March 8th.

The COMMISSIONER: 1930?

The WITNESS: 1930.

Mr. GRAHAM: Q. In connection with the first communication you had about the 30-cent rate with Mr. Van Bokkelen on March 3rd, which ship did this concern?

Mr. SAPIRO: May it please your Honor, we will object to that as incompetent, irrelevant and immaterial. We want the telegram produced.

Mr. GRAHAM: What telegram are you talking about?

Mr. SAPIRO: You are talking about a conversation concerning a telegram.

Mr. GRAHAM: I didn't ask him anything about a telegram.

Mr. SAPIRO: He said he didn't have anything

(Testimony of R. S. Wintemute.)

on March 3rd about the 30-cent rate except the telegram from Mr. Van Bokkelen and a discussion on March 8th. Isn't that right?

The WITNESS: Yes.

Mr. SAPIRO: That is fine.

The COMMISSIONER: Read the question.

(Question read)

Mr. SAPIRO: If it is a communication I want the communication; if it is a discussion, that is something different.

Mr. GRAHAM: We are talking about the communication, but I am not introducing the communication at all. I am asking this witness about the communication.

Mr. SAPIRO: Well, the communication itself is the best evidence of what it contains.

Mr. GRAHAM: If your Honor please, I am not asking the witness any questions on the communication at all. I am asking him what his present recollection is of the situation referred [271] to on that date, and he has a recollection without reference to the communication, and I think he is entitled to testify as to his present recollection.

The COMMISSIONER: Q. Did you have a discussion on that date? A. On the 8th.

Mr. GRAHAM: But it concerns itself not with the discussion, but with a communication, and I have asked him as to his present recollection, and he is certainly entitled to testify as to his present recollection of that communication without the introduction of the communication.

(Testimony of R. S. Wintemute.)

The COMMISSIONER: Yes; do you have any independent recollection?

The WITNESS: Yes, I have.

The COMMISSIONER: All right.

A. We got in touch with the McCormick Steamship Company and agreed to that rate of 30 cents.

The COMMISSIONER: Well, with whom did you agree?

A. With the McCormick Steamship Company.

Mr. SAPIRO: Would that be competent here what the McCormick Steamship Company agreed to?

Mr. GRAHAM: Well, if there is no objection to showing it, the McCormick Steamship Company—off record,—is one of the competing lines.

Q. Which ship, Mr. Wintemute, did this 30-cent rate concern itself with?

Mr. SAPIRO: The one you discussed on March 3rd, you mean? Is that right? Is that what you are talking about?

Mr. GRAHAM: We didn't have any discussion on March 3rd.

Mr. SAPIRO: That is just what you are asking him about. Are you referring to this communication of March 3rd or what? [272]

Mr. GRAHAM: Yes, I am.

A. The Motorship Villanger.

Mr. GRAHAM: Q. At that time was the Hindanger in line for loading?

A. She was on her way up the Coast, south of Los Angeles.

Q. And at that time, on March 3rd, what was the status of your negotiations with the libelants in this case?

(Testimony of R. S. Wintemute.)

A. On March 3rd we had figured that the libelants were not shipping any eggs to Buenos Aires. They had not accepted our offer of 40 cents per case.

Mr. GRAHAM: I think that is all.

Cross-Examination.

Mr. SAPIRO: Q. Mr. Wintemute, when did you first examine your records in reference to this transaction?

A. It was sometime after the libel on the Hindanger was filed.

Q. Now, you examined them just prior to coming in here for the trial of this proceeding, did you not? A. Yes, sir.

Q. You had examined this prior to my examining you the other day, didn't you? A. Yes, sir.

Q. How was it you didn't tell me the other day you had a conference with Mr. Benjamin in February.

Mr. GRAHAM: You didn't ask him, I guess.

Mr. SAPIRO: Wait a minute. I don't want counsel's answer. I want the witness' answer. You let the witness answer.

Q. How was it you didn't tell me about that second conversation with Mr. Benjamin, when I asked you.

A. I didn't tell you anything of the kind.

Q. No. You told me you had one conference with Mr. Benjamin, which was held in either November, December or the latter part of January, didn't you?

(Testimony of R. S. Wintemute.)

A. To the best of my knowledge. [273]

Q. You didn't tell me you had a second conference with him in February, did you?

A. I didn't recall it.

Q. You didn't recall it. But you had checked your records, hadn't you? A. Certainly.

Q. And then you found out later that you had it?

A. Certainly.

Q. But you didn't recall it until you heard the testimony? A. I did not.

Q. Let we ask you this, you heard the testimony in court before you recalled that request—the one you had the other day.

Mr. GRAHAM: What one?

Mr. SAPIRO: You questioned him with reference to a telegram.

Mr. GRAHAM: You have seen the only telegram I was examining him about the other day.

Mr. SAPIRO: But I want to see it.

Mr. GRAHAM: It was introduced in evidence, I think, Mr. Commissioner.

Mr. SAPIRO: No, I don't think it was.

The COMMISSIONER: No, I guess you have it. Do you remember what the telegram was about, Mr. Sapiro?

Mr. SAPIRO: It was a telegram about February 15th, I think it was.

The COMMISSIONER: That is not in evidence. You tore one or two papers from the file and introduced them in evidence, did you not?

Mr. SAPIRO: I didn't introduce it in evidence.

(Testimony of R. S. Wintemute.)

The COMMISSIONER: Just a minute. (Examining papers).

Mr. SAPIRO: Have you the exhibits, Mr. Commissioner?

The COMMISSIONER: Yes. Which ones do you want?

Mr. GRAHAM: In answer to your inquiry, Mr. Sapiro, I hand you a cable which we discussed at the last hearing, which [274] referred to a shipment of eggs on the Villanger?

Mr. SAPIRO: Now, never mind. I don't want any characterization from you.

Q. Now, Mr. Wintemute, you gave out—at least the company, the General Steamship Corporation, gave out these schedules. (Referring to Libelant's Exhibit 1) A. Yes.

Q. Did you expect the shippers to believe them?

A. As far as the indications were then, yes.

Q. You did? A. Certainly.

Q. Then you expected the shippers to believe that the voyage of the Motorship Hindanger is 35 days?

A. We expect the shippers to check up before they made any shipments, yes, inasmuch as that schedule was printed at least four or five months beforehand.

Q. Did you expect the shippers to believe that the sailing schedule was 35 days?

A. Leaving when?

Q. Regardless of the leaving time.

A. Well, the sailings, the schedules can not be guaranteed at any time.

(Testimony of R. S. Wintemute.)

Q. I am not asking you that. I am asking you if you expected them to believe that.

Mr. GRAHAM: When, in November.

Mr. SAPIRO: Q. Did you expect them to believe that sailing schedule was 35 days? A. When?

Q. On this schedule? A. At what time?

Q. When you advertised it here. Did you expect them to believe that the Hindanger would take 35 days?

A. I expected them to take reasonable precautions.

Q. Oh, you expected them to take reasonable precautions to check the truth of your statements as to the time it would take?—— A. No. [275]

Q. ——to go from San Francisco to Buenos Aires?

A. No, I beg your pardon. I expected them to take reasonable precautions to check up on this schedule at the time.

Q. As to the date of sailing? A. Certainly.

Q. But how about the sailing schedule, the time that would elapse?

A. The sailing schedule was away out of date.

Q. Was away out of date? A. Yes.

Q. Then did you ever give out any new ones?

A. I did not.

Q. It was away out of date and you never put any new ones out showing any different time for the voyage? A. No, sir.

Q. You did not?

A. No, no printed schedules of that kind.

(Testimony of R. S. Wintemute.)

Q. These printed schedules were the only ones you used to give information to the shippers of the time of the voyage?

A. The only printed schedule.

Q. Did you ever inform a shipper that it would take more than 35 days for the Hindanger to make the voyage? A. It is quite possible I have.

Q. Whom did you inform?

A. I don't know, just who.

Q. Did you ever inform these people?

A. I never informed them at all.

Q. Did you ever inform—— You never informed them at all? A. No, sir.

Q. The letters that were written by Mr. Reali, were they written under your direction?

A. I can not recall that they were. Mr. Reali has the authority to write those letters. I don't have to direct him to answer them.

Q. Well, would you say that the General Steamship Corporation ever informed them?

A. Informed them of what?

Q. That the Hindanger would take 35 days to make the voyage? [276]

A. There on that schedule?

Q. Yes.

A. I said that sheet was some months behind.

Q. And you never informed your shippers as to any change? A. It was not necessary.

Q. It was not necessary. But you never in-

(Testimony of R. S. Wintemute.)

formed them, for instance, that the Brimanger would take 31 days?

A. It was not necessary, because they made no booking: we made no bookings with them.

Q. But you put this schedule out and you intended the people to believe it, wasn't that right?

A. It was the best indication we could give them at the time.

Q. Yet, at that time no boat had never made that time had it? A. No, they had not.

Q. But you did not tell that to your shippers, did you——

A. Because the first ship going via the Canal had hardly gotten down there.

Q. What ship? A. The Motorship Hindanger.

Q. Was that the first ship to go that way?

A. That was the first ship to go that way; sailing in November.

Q. And it was not down there then?

A. I don't recall the exact date she arrived, but I know she sailed in November.

Q. What about your information in January?

A. What information in January?

Q. As to how long it would take a boat to go to Buenos Aires?

A. That was the best information we had at that time.

Q. Now, you state also in this schedule that the stop-over at Montevideo would be one day. Had any boat ever stopped over one day there?

A. That was quite right at that time.

(Testimony of R. S. Wintemute.)

Q. It was right at that time?

A. It could quite possibly have been done. [277]

Q. But had any boat ever stopped over, of your boats, on this line, one day at Montevideo?

A. Not that I can recall right now.

Q. Well, you know. You have made an investigation since this case started.

A. But you must remember that this ship sailed through the Canal, and I don't know——

Q. I don't care how it sailed——

A. (continuing) this schedule may have been changed somewhat.

Q. I am talking about your stop over at Montevideo?

A. I would have to check my records to find out.

Q. You know, as a matter of fact, don't you, that no ship ever stopped at Montevideo less than four days?

A. I don't know. Some ships never have gone to Montevideo.

Q. But those that had gone there and stopped there?

A. I would have to check my records.

Q. You would have to check your records?

A. Well, I might say for the benefit of the Commissioner that the deposition taken in this case the cross-examination shows the stop-overs, or, the interrogatories.

Q. Now, I notice you said in answer to Mr. Graham when you were on the stand before that you gave out these printed schedules from day to day.

(Testimony of R. S. Wintemute.)

Did you give out daily schedules?

A. I don't know that I ever made such a statement.

Q. Did you mean printed schedules, Mr. Sapiro?

Mr. SAPIRO: The witness said he gave out schedules from day to day.

Q. What kind did you give out?

Mr. GRAHAM: I think the witness should be confronted with the testimony which you refer to. [278]

Mr. SAPIRO: He said from day to day the sailing schedules were delivered to the shippers.

Mr. GRAHAM: I doubt very much if the witness ever said anything of the kind.

Mr. SAPIRO: Well, don't you doubt it for a moment, Mr. Graham, because I have it right here. I wrote it down at the time.

Mr. GRAHAM: Well, I do doubt it. I doubt very much if the witness answered that he gave out the printed sailing schedules from day to day.

Mr. SAPIRO: If you will get the reporter here I will show you where he said it.

Mr. GRAHAM: Then I will object to the question until we get the reporter because I don't think the witness said anything like that. Why don't you ask the witness right now whether he said it or not.

Mr. SAPIRO: Certainly, this witness would say so. I wouldn't trust him. I will take the record.

Mr. GRAHAM: All right. Get the record, then.

(Testimony of R. S. Wintemute.)

The COMMISSIONER: Can we get the record.

(Discussion off record)

The COMMISSIONER: The reporter is in court and can not be had here at this time.

Mr. SAPIRO: Q. You stated that the statement appearing on the sailing schedule "And other ports as inducements offer" is notice to the shipper that the boat is apt to stop at other ports?

A. Yes, sir.

Q. And I presume if that was not on there the shipper would not have that notice?

Mr. GRAHAM: I object to that as calling for the conclu- [279] sion of the witness. That is for the court to determine.

Mr. SAPIRO: If your Honor please, he asked him what that statement meant when he was questioning this witness the other day and I have a right to cross-examine him on it.

(Argument)

The COMMISSIONER: I will allow the question.

Mr. GRAHAM: I object to its allowance.

The WITNESS: Will you repeat the question?

(Question read)

The WITNESS: I did not assume anything of the kind.

Mr. SAPIRO: Q. You did not?

A. No, sir.

Q. And it would make no difference whether the shipper knew you were going to stop at other ports as inducements offered?

(Testimony of R. S. Wintemute.)

A. No, sir.

Q. You say it does make a difference?

A. No, sir. We always, when sailing vessels, we have the right to go to other ports enroute if cargo is offered.

Q. You say you have the right. How about the shipper? How does he feel?

Mr. GRAHAM: That is objected to on the ground that it calls for a conclusion of the witness, obviously, how the shipper may feel.

The COMMISSIONER: Mr. Wintemute certainly can not answer as to how the shipper feels.

Mr. SAPIRO: But he stated the other day in answer to Mr. Graham that this phrase in here meant to the shipper.

The COMMISSIONER: Objection sustained.

Mr. SAPIRO: Q. You are familiar with the Guide, are you not?

A. Yes, sir.

Q. The Guide is used by shippers for the purpose of ascertaining [280] information as to various steamship lines?

A. Some shippers, yes.

Q. And other shipping facilities. And you advertise in the Guide in order to convey that information to shippers, don't you? A. Yes, sir.

Q. And you have this advertisement that appears in this Guide of March 4, 1930?

Mr. GRAHAM: May it please the court, I object to any questions of this witness on the statements as contained in the Guide. The Circuit Court

(Testimony of R. S. Wintemute.)

of Appeals in this Circuit, in the case of the "West Aleta" had before it the question of receipt of evidence and the admissibility of evidence of statements contained in advertisements in the Guide, and particularly in that case, in the opinion of the court, the court ruled that the Guide was not to be given the effect of evidence, and that is true in both the District Court and the Circuit Court, that testimony as to the Guide was ruled to be inadmissible.

Mr. SCHULZ: May it please your Honor, the reason the testimony was ruled to be inadmissible in that case was because the bill of lading was conceded to be the contract of the carriers, the written bill of lading was the contract between the parties and it was held under the parol evidence rule that any parol testimony had to be excluded and Judge Kerrigan specifically based his decision on the ground of the parol evidence rule; but that has nothing to do with where you are trying to prove an oral contract. The parol evidence rule would not apply then.

Mr. SAPIRO: Regardless of that, your Honor, we have here one of the respondents' exhibits, that he introduced himself, during the direct examination of this witness.

Mr. GRAHAM: I introduced that Guide, as you well know, [281] Mr. Sapiro, for the sole purpose of making a record on the stipulation we entered into, that we would supply all available information, but we certainly did not stipulate as to any testimony, or

(Testimony of R. S. Wintemute.)

any advertisements in the Guide being admissible in evidence; we didn't stipulate to the admissibility of any evidence; and I will object to the introduction of any evidence as to the use of the Guide, or any information contained in it.

The COMMISSIONER: I will allow it subject to your motion to strike, if it is inadmissible.

Mr. SAPIRO: Q. Now, examine this issue of the Guide of March 4, 1930. You examine that top portion which recites the ports, "Rio de Janeiro, Santos, Montevideo, Buenos Aires, Rosario and Santa Fe." That is all it says, isn't it, with the parentheses—what does that say, Mr. Wintemute?

A. "If inducements offer."

Q. "If inducements offer." Now, did you intend to convey to the shippers by that advertisement the fact that you would stop at those ports only if you had cargo for those ports? A. No, sir.

Q. You did not? A. No.

Q. What does it intend to say to the shipper?

A. It is intended to convey the principal ports of the route.

Q. The principal ports of the route?

A. Yes, sir.

Q. Why did you use the expression "If inducements offer"?

A. One of those ports might be omitted if there was no cargo offered there.

Q. One of those ports might be omitted?

A. If there was no cargo there, yes.

Q. But you don't indicate that you will omit any

(Testimony of R. S. Wintemute.)

of these [282] ports in your advertisements in any way, do you?

A. Not necessarily. It isn't necessary.

Mr. GRAHAM: It is understood, your Honor, that I object to all this line of questions as to the admissibility of anything contained in the Guide.

The COMMISSIONER: Yes.

Mr. SAPIRO: Q. Then it might possibly be interpreted that you not have called at any of these ports?

A. I say it might be possible that any of those ports might be omitted, or we would call at any of those ports if there was cargo there; and it might be possible that we would add ports not shown thereon.

Mr. GRAHAM: I show you now, Mr. Sapiro, the original cable or telegram which you called for the production of. That is now here and I present it to you.

(Mr. Sapiro examined the document and returned to counsel)

Mr. SAPIRO: Q. Now, you say you had your first meeting, at which Mr. Benjamin was present, sometime in the latter part of January?

A. I believe that was the time.

Q. And who was present there at that time?

A. At that time I recall Mr. Benjamin, Mr. Sanders of the Washington Cooperative Egg & Poultry Association, and three men from the Pacific Egg Producers, or the Pacific Egg Producers Cooperative.

(Testimony of R. S. Wintemute.)

Q. Was Mr. Rother, the president, there?

A. I think he was.

Q. Was Mr. McKibben, the gentleman who testified the other day, there?

A. The exact names, I can't remember. In fact, I have called one of the gentlemen by name and it turned out he was somebody else when I met him.

Q. Was Mr. Lawler present?

A. That, I can not recall.

Q. What was said at that conference?

A. The whole conference [283] dealt with the shipment of eggs to Buenos Aires; and the freight rate was the prime topic of conversation.

Q. Was there anything discussed as to the Argentine market? A. There probably was.

Q. What was discussed with respect to the Argentine market? A. I can't just recall.

Q. Was there anything discussed as to the time of shipment? A. Quite possibly there was.

Q. As a matter of fact, there was a discussion as to the availability of eggs on the Pacific Coast,—the time they were available, wasn't there?

A. Not as far as I know.

Q. You say there was not?

A. I say, as far as I know.

Q. Would you say there was not?

A. I couldn't say there was, or I wouldn't say there was not.

Q. Well, would you say there was not?

A. I will say I can not recall.

Q. You can't recall? A. I can not.

(Testimony of R. S. Wintemute.)

Q. And was there any discussion as to the time when it would be best to arrive, or to have the eggs arrive in the Argentine? A. No, sir.

Q. None at all. A. No, sir.

Q. Was there any discussion of the competition of eggs from Holland and the eastern states?

A. I believe there was.

Q. Was there any discussion as to the time that those eggs became available in the Argentine for the purpose of competition?

A. I don't think there was.

Q. You don't think there was?

A. No, I don't think there was.

Q. Would you say there was not?

A. I will say there was not, yes, sir.

Q. You will say there was not?

A. Yes. I will tell you why. [284]

Q. I don't want to know why.

A. I think Holland eggs were mentioned on account of competition and the necessity of having the lowest freight rate in order to meet Holland competition and New York competition.

Q. And was there anything said as to when they would get in there, or the quantity that would arrive at any particular time? A. No, sir.

Q. And it was your impression that any amount could go into those markets at any time?

A. Well, any market is limited.

Q. I want to know what your impression was of that market.

(Testimony of R. S. Wintemute.)

Mr. GRAHAM: I don't think it is material what this witness thought of any particular market.

Mr. SAPIRO: I have a right to cross-examine him.

Mr. GRAHAM: But you are not asking him anything about anything I asked him on direct. I didn't ask him anything about the market in Argentine, or on the Pacific Coast.

The COMMISSIONER: Objection sustained.

Mr. SAPIRO: Q. But you knew that market was limited, didn't you, Mr. Wintemute?

Mr. GRAHAM: I will object to that question.

The COMMISSIONER: What was the question?

Mr. GRAHAM: The question was, whether this witness knew whether that market was limited. I don't think it is material whether any market was limited.

The COMMISSIONER: Objection sustained.

Mr. SAPIRO: Q. You derived your information with regard to the common market in the Argentine from these conferences, didn't you?

Mr. GRAHAM: I object to that——

Mr. SAPIRO: I certainly have a right to cross-examine [285] him as to what he acquired in the way of information out of these conferences that he had and about which he testified. I think that is proper.

Mr. GRAHAM: He has already testified that he didn't acquire any knowledge as to when the eggs arrived there.

The COMMISSIONER: You can ask him what

(Testimony of R. S. Wintemute.)

the conversations were about.

Mr. SAPIRO: And I can cross-examine him as to the subject matter about which he testified. This is cross-examination.

The COMMISSIONER: Yes.

Mr. GRAHAM: But you can not cross-examine him on matters I didn't ask him anything about on direct. I didn't ask him anything about market conditions in the Argentine.

Mr. SAPIRO: But you examined him about conferences which he had.

Mr. GRAHAM: You can examine him all you want about the conferences; but you are examining him now about market conditions in the Argentine.

The COMMISSIONER: Read the question, Mr. Reporter.

(Question read as follows:

"Q. You derived your information with regard to the common market in the Argentine from these conferences, didn't you?")

The COMMISSIONER: Yes; that is going too far afield. Objection sustained.

Mr. SAPIRO: Q. What was said in that conference about the Argentine market?

A. That there was a possibility of selling eggs from the Pacific Coast there.

Q. Was anything said as to the times?

A. How do you mean? How do you mean,—time?

Q. The time when it was possible?

A. Yes. [286]

(Testimony of R. S. Wintemute.)

Q. It was? A. Yes.

Q. What was said?

A. They were figuring on shipping eggs on the Villanger.

Q. What was said as to the time?

Mr. GRAHAM: The witness has already answered the question.

Mr. SAPIRO: I will ask that the answer go out, your Honor, as not responsive.

Mr. GRAHAM: Well, it certainly is responsive.

Mr. SAPIRO: No, it is not. Read the question and answer. I am not going to argue with this counsel.

Mr. GRAHAM: It might not be a question of argument——

Mr. SAPIRO: If your Honor please——

The COMMISSIONER: Read the question, please, Mr. Reporter. I will determine whether or not it is responsive.

(Question read by the reporter)

Mr. SAPIRO: I think we are entitled to an answer to that question as to what was said as to the time.

The COMMISSIONER: All right. What was said as to time?

A. That the Motorship Villanger was quite all right to move eggs, subject to the freight rate being satisfactory.

Mr. SAPIRO: Q. When was the Motorship Villanger to go in there?

A. She was to sail from San Francisco in early March.

(Testimony of R. S. Wintemute.)

Q. Was that discussed at that meeting?

A. The Villanger was entirely discussed.

Q. Was the fact that she was to sail in early March discussed? Now you answer my questions as they are put, Mr. Wintemute, and not the things which you are just trying to put in. Was the fact that the Villanger was to sail in early March discussed specifically at that meeting?

A. I could not state [287] specifically, but I know the Motorship Villanger was the ship which was in position at the time and that was the reason she was being discussed.

Mr. SAPIRO: I ask that the answer go out as not responsive.

The COMMISSIONER: No, I don't think so. I think it is properly responsive to the question.

Mr. SAPIRO: Q. Was anything said as to when the ship was to sail?

A. I gave them undoubtedly the position of the ship at that time.

Q. Did you tell them when the ship was to sail from San Francisco at that conference?

A. Undoubtedly I must have given them her position.

Q. Well, did you or didn't you?

A. I must have given them an indication.

Q. Well, did you tell them when it was going to sail?

A. I didn't give them any definite dates, but I undoubtedly indicated about when she was going to sail.

(Testimony of R. S. Wintemute.)

Q. You didn't give them any definite date?

A. No.

Q. And that was in January?

A. That was in January.

Q. And the Hindanger had never been mentioned to these people before?

A. It may have come up as a subject of general discussion on the movement of eggs.

Q. Oh, then the Hindanger was discussed in this conference? A. It may have been.

Q. Well, was it?

A. I don't know. It may have. It is quite possible it was.

Q. Had you ever taken up the subject of the Steamer Hindanger with these people before that?

A. Not at these discussions, as I recall.

Q. Well, when had you discussed the Hindanger with them? [288]

A. We discussed several ships with them.

Q. Well, when had you taken up the question of the Hindanger?

Mr. GRAHAM: Give him a chance to answer. Don't shut him off just simply because he doesn't answer the question the way you want it answered.

Mr. SAPIRO: No, he does not have to answer it the way you want him to answer, either.

Mr. GRAHAM: Mr. Commissioner, I don't think the witness ought to be shut off like that. He ought to have an opportunity to finish his answer.

The COMMISSIONER: If you don't understand

(Testimony of R. S. Wintemute.)

the question, just indicate that you don't understand it.

A. According to the letter sent from our office the Hindanger was apparently discussed as far back as January.

Mr. SAPIRO: Q. Yes. Now, when did you look over that letter?

A. It was here as an exhibit.

Q. Yes, I know. But when did you look over that letter? Will you just listen to the question and if you don't understand the question, please ask the Commissioner to have it repeated, but if you do understand, just answer the question.

A. You mean the original letter?

Q. When did you last look over that letter?

A. That letter is on file here.

Q. When did you look over that letter last?

A. Which letter do you mean?

Q. The letter you are referring to?

A. I saw it here the other day.

Q. The other day? A. Yes, sir.

Q. And in your examination the other day, prior, apparently, to your looking over the letter, you stated no mention had ever [289] been made of the Hindanger until March.

A. On the shipments of eggs which moved on the Hindanger, yes.

Q. But you didn't say that, though?

A. That is what I intended to say.

Q. Oh, that is what you intended to say?

A. I thought that was what all the discussion was about.

(Testimony of R. S. Wintemute.)

Q. You did? A. Yes, sir.

Q. Now, you had your second meeting, when?

Mr. GRAHAM: With whom?

Mr. SAPIRO: With Mr. Benjamin.

A. I could not say when the second meeting was or whether I had two or three meetings with him. I might have had conversations with him over the 'phone.

Mr. SAPIRO: Q. When was the next meeting you had with Mr. Benjamin?

A. Apparently we had one on February 15th.

Q. February 15th?

A. Yes, as far as your witnesses volunteered that information, and I quite agree it was quite possible that we had a meeting on February 15th.

Q. Did you have that conference, or didn't you?

A. Apparently I did.

Q. Apparently you did. Now, who was present there? A. I can not recall.

Q. You don't recall who was present?

A. Oh, I know some of the egg people were there.

Q. But you don't recall who they were, or do you recall whether the Argentine markets were discussed? A. I do not.

Q. You don't recall that?

A. I don't recall.

Q. Would you state that there was no discussion of the times at which eggs should go into the Argentine? A. Not at that meeting. [290]

Q. Would you say there was not?

(Testimony of R. S. Wintemute.)

A. Are you talking about February 15th—the meeting on February 15th?

Q. Yes. A. I could not say.

Q. You wouldn't say there was not, would you?

A. I could not say there was or was not.

Q. Would you say that there was no discussion of the times of shipment, that is, sailing times of the boats, the exact sailing time of the boats at that time?

A. At that particular meeting I could not say whether there was or not.

Q. You don't say there was?

A. I don't say there was. I couldn't say there was or was not.

Q. And would you say there was any discussion of the quantities that the Argentine market could absorb at the particular times? A. No.

Q. Would you say there was not?

A. No, I wouldn't say.

Q. Would you say there was not?

A. I would say there was not.

Q. You say there was not. And would you say there was any discussion as to the availability of eggs for shipment from the Pacific Coast at various times?

A. It is quite possible there was.

Q. There was discussion of that?

A. It is quite possible there was. I can't recall exact instances.

Q. You can't recall what was said?

A. No, sir.

(Testimony of R. S. Wintemute.)

Q. Or the general subject matter of the discussion as to that point?

A. No; for the simple reason that the topic of conversation, or the discussion at that time was the question of freight rates, and that was the prime discussion all through.

Q. How many hours did you discuss the freight rates?

A. We discussed it at practically every meeting we had.

Q. And how many were those?

A. I can't recall. [291]

Q. And the time was spent almost constantly in a discussion of the freight rate?

A. The greater part of it was freight rate.

Q. But you wouldn't say these other subject matters which I have mentioned were not discussed?

A. I would not say so.

Q. Now, you had a conversation, I understood you to say, on March 8th, with Mr. Van Bokkelen?

A. Yes, sir.

Q. Was that a conference in which you told Mr. Van Bokkelen that the McCormick Line did not want any of these eggs?

A. I didn't tell Mr. Van Bokkelen anything of the sort.

Q. When did you tell him that?

A. I can't recall that I ever told him that.

Q. You can't recall that you ever told him that?

A. I never told him that.

(Testimony of R. S. Wintemute.)

Q. What did you tell him about the McCormick Line not wanting the eggs?

A. I never told him that.

Q. Did you say you did not tell him anything about the McCormick Line not wanting any of those eggs or that you don't just recall, or can't recall?

A. I did not.

Q. You did not? A. No.

Q. Now, it is just too bad the stories don't jibe. I understand that you have read this letter of January 27th. I think you have that letter, Mr. Graham. It is Libelant's Exhibit—I think that is the one there, Mr. Commissioner.

The COMMISSIONER: That is March 10th.

Mr. GRAHAM: I think you may have a copy of that, Mr. Sapiro, because you copied certain exhibits.

Mr. SCHULZ: Here it is.

Mr. SAPIRO: Yes, I have got it now.

Q. Now, have you your letters prior to this date, between [292] yourself and the Pacific Egg Producers? A. What letters?

Q. Well, this letter of January 27th, for instance, says, "Referring to correspondence already exchanged and recent conversations."

A. As I did not write that letter, I can not recall what correspondence it referred to.

Q. Well, you checked your files, didn't you?

A. I didn't check my files in connection with this particular letter.

Q. You did not check your files?

(Testimony of R. S. Wintemute.)

A. Not in connection with this particular letter, no, sir.

Mr. SAPIRO: I will ask counsel has he any prior correspondence?

Mr. GRAHAM: From this witness?

Mr. SAPIRO: No, from the General Steamship Corporation in this matter.

Mr. GRAHAM: I have some prior correspondence, but I haven't any from this witness.

Mr. SAPIRO: Have you any prior correspondence referring to the options on the Steamship Hindanger?

Mr. GRAHAM: Yes; that is one of the letters. I told you the other day we might have other correspondence and you said we could not find any the other day, and there is one of them. (Handing paper to Mr. Sapiro).

Mr. SAPIRO: Q. Now, I see here by this copy of the letter dated January 13th, 1930, that at that time you gave the Pacific Egg Producers an option on 8000 cases sailing on the Motorship Hindanger, which was sailing in March, didn't you?

A. Yes, sir.

Q. And 8000 cases on the Brimanger sailing in May?

A. No; the Brimanger sailing in the second half of April. [293]

Q. April, rather. The Hindanger sailing the second half of March? A. That is right.

Q. And the Brimanger sailing the second half of April? A. Yes.

(Testimony of R. S. Wintemute.)

Q. And the Villanger sailing the second half of May? A. That is right.

Q. Now, on January 27th, 1930, you wrote another letter, or your corporation wrote another letter which apparently followed certain letters and certain conversations? A. Correct.

Q. Does that include these conferences which you first described as having with Mr. Benjamin?

A. This had nothing to do with the conferences.

Q. Nothing to do with the conferences?

A. No, sir.

Q. Mr. Wintemute, I understood you to say that you—when was that conversation with Mr. Benjamin, before or after this letter was written.

A. That, I can not say.

Q. That, you can't say?

A. I can't say the exact date of the first conversation.

Q. By the way, in this letter of January 27th, 1930, Exhibit 2 of the Libelants, it says, "Referring to correspondence already exchanged and recent conversations, regarding option granted you for shipment of eggs to the Argentine during March, April and May, we now find that it will be necessary to alter our schedule due to unavoidable delays experienced by our vessels at South American ports. Motorship 'Hindanger' is now scheduled to sail from San Francisco March 24th, arriving at Buenos Aires on or about April 28th." That is thirty-five days, isn't it?

Mr. GRAHAM: Mr. Sapiro, may I ask if this

(Testimony of R. S. Wintemute.)

letter you are reading from was sent to Mr. Benjamin?

Mr. SAPIRO: It is addressed to the Pacific Egg Producers. That is the organization of which Mr. Benjamin is general [294] manager.

Mr. GRAHAM: I had forgotten Mr. Benjamin's position.

Mr. SAPIRO: Q. That is 35 days, isn't it, March 24th to April 28th?

A. Yes; that is 35 days.

Q. That is 35 days?

A. That is the best information we could give them at that time, the best indication.

Q. I just wanted to call your attention to the fact because you said you never told them anything about the Hindanger making that trip in 35 days. This letter also says "In accordance with your request we are extending option for 9200 cases eggs which should fill the two small chambers to capacity" and so on. Then the letter goes on and states that the Motorship Taranger will be substituted for the Brimanger? A. Yes, sir.

Q. Now, you were giving options on those boats for shipments at certain times? A. Certainly.

Q. Then you had or were to have a conference with the General Manager of this organization in reference to shipments to those same territories?

A. In connection with shipments to Buenos Aires.

Q. Shipments to Buenos Aires. And you didn't discuss these options in any sense?

(Testimony of R. S. Wintemute.)

Mr. GRAHAM: I don't think the witness testified that he did not discuss the options in any sense.

The WITNESS: I doubt it very much.

Mr. SAPIRO: Q. You doubt it very much.

A. Yes.

Q. Well, did you or didn't you?

A. I doubt it very much.

Q. You just doubt it?

A. I doubt it very much.

Q. You heard the statement of Mr. McKibben when he was here the other day?

A. Yes, sir, I heard Mr. McKibben's statement also, but I will say that Mr. McKibben was in error when he said that [295] the Hindanger was mentioned and that he remembered it because of the peculiarity of the name. He was absolutely incorrect. The Villanger was the ship referred to at that meeting.

Q. You don't think the Hindanger is a peculiar name, do you?

A. Not any more peculiar than the Villanger.

Q. But the time of shipment is different. And you heard Mr. McKibben say, the boat was scheduled to sail at that time? A. Yes, sir.

Q. Now, you didn't have the Villanger scheduled to sail from Seattle on March 24th at any time, did you? A. No, sir.

Q. When did you have it scheduled to sail from San Francisco, around the 1st part of April?

A. No, sir.

(Testimony of R. S. Wintemute.)

Q. As a matter of fact, at the time you had these conferences you knew something about the egg industry in California, and I guess in Washington, too, didn't you?

Mr. GRAHAM: I object to that as immaterial whether this witness knew anything about the egg industry in California or Washington or not.

The COMMISSIONER: Yes; I think it is immaterial.

Mr. SAPIRO: That is a preliminary question, your Honor.

The COMMISSIONER: I will sustain the objection.

Mr. SAPIRO: Q. You knew the eggs had to be gathered and brought to port, didn't you?

A. I knew somebody had to deliver the eggs to the ship, yes.

Q. But you knew they were not all collected right next door to the ship?

A. I didn't know where they had to come from. They may have been in storage.

Q. You don't know anything about where they get the eggs from?

Mr. GRAHAM: I object to that as immaterial.

A. Where they might have gotten their eggs from? [296]

Mr. SAPIRO: Q. Yes.

A. No, not exactly.

Q. Do you remember when you increased the option on the Brimanger from 8000 to 9200?

A. I would have to look up the records on that.

(Testimony of R. S. Wintemute.)

Q. Have you got those records here?

Mr. GRAHAM: Why, Mr. Sapiro, I think it is in your letter here that you have already introduced in evidence, the one dated January 27th. It says right here on the second page "We are granting you option on this vessel for 9200 cases of eggs for Buenos Aires."

Mr. SAPIRO: Yes.

The WITNESS: I took it for granted the information was already in the record, if you had it in front of you.

Mr. SAPIRO: Q. I know that; but I want to know when did you make the increase; wasn't it after this conference with Mr. Benjamin?

A. As I testified before, I did not write the letter and I don't recall the exact date of the first conference with Mr. Benjamin.

Q. So it may have been written after that conference? A. It may have been after.

Q. And it may have been the result of that conference: is that correct?

A. I think I have already testified that it was not the result of a conference.

Q. You say it was not the result of a conference? A. Yes.

Q. What conference did you have which led up to the increase which you refer to in the letter that Mr. Reali refers to?

A. Mr. Reali was dealing with Miss Hunt, who is in the Pacific Egg Producers office, on two or three occasions.

(Testimony of R. S. Wintemute.)

Q. Then it was Mr. Reali who had the conferences leading up to the increase?

A. He may have done it. [297]

Q. He may have done it?

A. He may have, and I wouldn't know anything about it.

Q. And he gave the option without conferring with you? A. Yes.

Q. He could have done that without conferring with you? A. Certainly.

Q. Well, did he?

A. I don't know. I have already testified I don't recall the letter, or authorizing him to write that letter.

Q. Now, you had a conference with Mr. Van Bokkelen concerning eggs on March 8th?

A. Yes, sir.

Q. What was to be shipped at that time?

A. 15,000 cases.

Q. Fifteen thousand cases. From where?

A. From San Francisco and Seattle.

Q. On what boat?

A. On the Motorship Hindanger.

Q. Scheduled to leave, when?

A. Scheduled to load at Seattle, as I gave them, at that time, approximately March 24th, and at San Francisco about April 4th.

Q. Do you remember on what date you were advertising it to sail from San Francisco, at that time? A. I can't remember.

(Testimony of R. S. Wintemute.)

Mr. GRAHAM: Advertising it where?

Mr. SAPIRO: Advertising it in the Guide.

Mr. GRAHAM: I object to these questions as to advertisements in the Guide. I think it is wholly immaterial. It has not been shown that this witness did advertise, and I object to it on the ground it is inadmissible evidence.

The COMMISSIONER: I presume that is subject to the same objection as your motion to strike?

Mr. GRAHAM: Yes.

Mr. SAPIRO: Q. You recollect that from February 26th to [298] March 18th the Guide, or, rather, until March 17th—I presume to and inclusive of March 17th, the Guide contained an advertisement that the Hindanger would leave April 2nd?

A. It is quite possible, yes.

Q. And on March 8th you had told them it would leave April 4th? A. Yes.

Q. You didn't change your published advertisement?

A. I did not. I gave them the best indication that I had.

Q. Are you sure you didn't tell them April 2nd?

A. No, I did not change the advertisement; I am positive I told them about April 4th.

Q. About April 4th? A. About April 4th.

Q. Who is responsible for these changes in dates? A. Who is responsible?

Q. Yes. You say you didn't change them.

Mr. GRAHAM: Where does the Guide get the information from with reference to sailings?

(Testimony of R. S. Wintemute.)

The WITNESS: Well, we don't send the information to the Guide. They have their man come around to our office and they get in touch with me when I am there, or when I am not they get in touch with my assistant, or one of the boys in the office, to get the closest information they can at that time, and so if there is any change in the schedule we give it to them.

Mr. SAPIRO: Q. And you say you made no change. Now, you will also agree with me on the rate. Don't you? A. Yes.

Q. And that was the rate at which the eggs were shipped by the libelants? A. Yes, sir.

Mr. GRAHAM: Just a minute. We object to that, your Honor. I think that is one of the questions at stake, as to who shipped the eggs. [299]

The COMMISSIONER: I will allow it.

Mr. SAPIRO: Q. As I understood you to say in your direct examination, you closed the contract for the shipments that day, is that right? A. Yes.

Q. Subject to confirmation by the Pacific Egg Producers or the Poultry Producers of Central California? A. That they would supply the eggs.

Q. That they would confirm the contract?

Mr. GRAHAM: Just a minute. I object to that. I don't think the witness testified to any such thing. I think you are stating what he testified to, and I don't think he testified to any such thing, and I object to the question on the ground and move to strike it out.

(Testimony of R. S. Wintemute.)

The COMMISSIONER: It may go out.

Mr. SAPIRO: If your Honor please—

The COMMISSIONER: He says, or he testifies, as I understand, that he made a contract that day.

Mr. SAPIRO: Yes.

The COMMISSIONER: Now, I don't recall anything was said about confirmation of the offer.

Mr. SAPIRO: Yes; later he testified that he wanted the contract confirmed and for that reason he told Mr. Reali to get in touch with the Pacific Egg Producers.

The WITNESS: I testified that I wanted confirmation of the fact that those people would supply the eggs.

The COMMISSIONER: What did you testify to then? And, first of all, the contract was made on that day?

A. The contract was made on that day with Mr. Van Bokkelen.

The COMMISSIONER: Yes. Did you tell him anything about the confirmation?

A. We were given to understand, or I was [300] given to understand by Mr. Van Bokkelen that the Washington Cooperative and the California Poultry Producers would supply the eggs, and I was to get confirmation from them that the eggs would be supplied.

The COMMISSIONER: All right.

(Testimony of R. S. Wintemute.)

Mr. SAPIRO: Q. Now, when did you talk to Mr. Lawler?

A. The dates, I can not recall. I talked to several of these gentlemen.

Q. You heard Mr. Lawler testify here? A. Yes.

Q. Do you deny having had any of the conversations he testified to?

A. To the best of my recollection I talked to Mr. Lawler after the contract was made with Mr. Van Bokkelen.

Q. Do you deny any of the conversations about which Mr. Lawler testified?

Mr. GRAHAM: Just a minute. I think he ought to specify the conversations he refers to.

The COMMISSIONER: Yes.

Mr. SAPIRO: Q. This conversation of March 10th.

A. I can not recall what Mr. Lawler testified.

Q. Do you remember he testified that he spoke to you on March 10th. A. I think I do, yes.

Q. And that he confirmed—— A. Yes.

Q. ——the fact that they would ship these eggs under the arrangement made by Mr. Van Bokkelen?

A. I believe that is the case.

Q. He did that?

A. I believe he testified that way.

Q. And that was about the time you had your negotiations with Mr. Van Bokkelen?

A. That was sometime after the contract was made with Mr. Van Bokkelen.

(Testimony of R. S. Wintemute.)

Q. And he confirmed the fact that they would ship the eggs? [301]

A. I can't confirm whether it was on March 10th or any other date Mr. Lawler testified about.

Q. What date was it? A. I don't know.

Q. Do you think it was another date?

A. I haven't any idea.

Q. You wouldn't deny that it was on March 10th, would you?

A. I wouldn't admit it, either.

Q. Would you deny it?

A. I would not deny it or admit it.

The COMMISSIONER: Do you know what date it was?

A. No, I don't know the date.

The COMMISSIONER: That is the answer to that.

Mr. SAPIRO: You had a letter of March 12th. Where is that?

Mr. GRAHAM: Right here. (Handing document to counsel).

Mr. SAPIRO: Q. I want to call your attention to Respondents' Exhibit A, Mr. Wintemute, sent out by the office of the General Steamship Corporation on March 12th? A. Yes, sir.

Q. And to this, Libelant's Exhibit 3, sent out by the same corporation on March 18th? A. Yes.

Q. When did the change in amounts,—when were they arrived at?

A. Well, I assume that the shippers or the suppliers of the eggs themselves made the change.

(Testimony of R. S. Wintemute.)

Q. The buyers of the eggs?

A. The suppliers of the eggs. We didn't know, ourselves, until they told us, how many they were going to supply at San Francisco and Seattle.

Q. They made the change and agreed on the changed amounts under the terms that had previously been arranged with Mr. Van Bokkelen?

Mr. GRAHAM: Where are the changes, Mr. Sapiro?

Mr. SAPIRO: Well, I don't think he has any difficulty in finding them. One says "Seattle, 3000 cases; San Francisco, 12,000;" and the other, "Seattle, 4000; San Francisco, 11,000." [302]

Mr. GRAHAM: The witness already testified with reference to this second document, Libelant's Exhibit 3, and stated it was never returned to him.

Mr. SAPIRO: It doesn't make any difference whether it was returned to him or not. This comes from his office, the typewritten matter on there was put on this in your office?

The WITNESS: Yes.

Mr. SAPIRO: Q. Then, when was the change made in the number of cases of eggs to be shipped from Seattle and San Francisco?

A. I assume it must have been between the 12th and the 18th of the month, undoubtedly. Anybody could see that from looking at this and the letter.

Q. And all this typewritten matter appearing on this form was put on by your office? A. Yes.

(Testimony of R. S. Wintemute.)

Q. And sent out in the form that it is? A. Yes.

Q. I am referring to Libelants' Exhibit 3. You don't have any doubt, do you, Mr. Graham, that this was prepared in the office of the General Steamship Corporation?

Mr. GRAHAM: I haven't any ideas on it at all, Mr. Sapiro.

Mr. SAPIRO: Well, I just assumed you would.

Q. So that change was made by the shippers, as to the changes in amounts, I mean, and it was subject to the other arrangements that had been agreed on with Mr. Van Bokkelen? There was no change as to the rate. The rate is the same?

A. The rate is the same.

Q. Do you have any recollection, Mr. Wintemute, about stating in a conversation with Mr. Van Bokkelen that your line would handle the entire shipment?

Mr. GRAHAM: You mean the entire shipment of 15,000 cases of eggs, Mr. Sapiro? [303]

Mr. SAPIRO: Yes.

A. Yes, certainly; that is what they booked.

Mr. SAPIRO: Q. As a matter of fact, it had previously been contemplated that part of that would be divided between your line and the McCormick Steamship Company?

A. No; I testified that the 30-cent rate was agreed upon with the understanding that the eggs would be allowed to go on both ships; in other words, we would both work on the proposition, the same as when the 40-cent rate on eggs was put into

(Testimony of R. S. Wintemute.)

effect, when we influenced them to make shipment of 12,000 cases on the Villanger and 6000 on the McCormick steamer, which, I think, was the West Ira.

Q. Did you testify that Mr. Van Bokkelen wanted to get these eggs on the Westfal-Larsen Company line because of some promise he had made to the director of the Westfal-Larsen Company?

A. I testified he told me that he had promised Mr. Von Erpecon some, and some to ourselves, as he was anxious to induce Mr. Von Erpecon to give him the allocation of the last two of the new ships being built. He was after Mr. Von Erpecon, trying to get the allocation of the two last of the new ships being built for the trade, to put in his trade from New York to Buenos Aires, known as the Blavan Line, and in which Mr. Van Bokkelen was interested.

Q. And so he said he would give him the shipments?

A. So he, Mr. Von Erpecon would give him the ships. He promised Mr. Von Erpecon that he would give him a shipment of eggs to Buenos Aires, so he could get the allocation of two of the new ships.

Q. With whom did you talk from the McCormick Lines?

A. Either with Mr. Strettmatter, Mr. Bybee, or possibly both of [304] them.

Mr. GRAHAM: You mean about the rate question, Mr. Sapiro?

(Testimony of R. S. Wintemute.)

Mr. SAPIRO: Yes.

Q. When was that?

A. During the period of these negotiations.

Q. What date was it?

A. I can't recall the exact dates. That is foolish to ask me that.

Q. Was it in March?

Mr. GRAHAM: I think the witness has already testified that he discussed it during the period of these negotiations.

A. I think I can safely say that we discussed it in February.

Mr. SAPIRO: Q. When did you agree on the 30-cent rate?

Mr. GRAHAM: He has already testified to that, Mr. Sapiro, when he agreed on that.

Mr. SAPIRO: No, he hasn't.

Mr. GRAHAM: He hasn't? That is the very purpose for which I sent down town to get this original telegram which you demanded. He certainly has testified that he agreed on the 30-cent rate on a certain day.

Mr. SAPIRO: Well, if he so testified, let him say it again.

Q. When did you agree on the 30-cent rate?

A. After that telegram was received.

Q. But, when? That is what I want to know?

A. It was in March.

Q. How long after the telegram was received?

A. That, I can not recall.

(Testimony of R. S. Wintemute.)

Q. Was it a couple of days?

A. I beg your pardon?

Q. Was it two or three days?

A. It must have been almost immediately after that telegram was received.

Q. What do you mean by "almost immediately"?

A. As soon as we got the wire we immediately got in touch with them. It [305] might possibly have been the same day, within an hour after we received the wire.

Q. Well, did you agree within an hour?

A. Possibly we did.

Q. Did you send a wire back?

A. I think we did.

Q. Have you got the reply?

Mr. GRAHAM: You mean, has he got the wire that he sent?

Mr. SAPIRO: Yes.

Mr. GRAHAM: Q. Is that the wire you sent, Mr. Wintemute?

A. That is the wire that we sent, yes. That is right.

Mr. GRAHAM: I would like the record to show Mr. Commissioner, that I have produced the original of the telegram, dated March 3, 1930, from Mr. Van Bokkelen to the General Steamship Corporation concerning which Mr. Sapiro questioned the introduction of a copy of that telegram or objected to the witness refreshing his memory from a copy.

Mr. SAPIRO: Just a minute. It is not a question of my questioning the copy——

(Testimony of R. S. Wintemute.)

Mr. GRAHAM: I didn't think it was necessary or didn't intend to introduce it, but since you have questioned it——

Mr. SAPIRO: It is not a question of my questioning it. I have a right to demand the production of the original.

Mr. GRAHAM: I want the record to show that I am offering it to you now.

The COMMISSIONER: Do you want this to go in evidence, Mr. Graham?

Mr. GRAHAM: You might mark it for identification if there is any question about it.

Mr. SAPIRO: We don't need it marked for identification.

Mr. GRAHAM: Then I will introduce it, myself.

Mr. SAPIRO: All right. [306]

THE COMMISSIONER: I will mark it Respondents' Exhibit E.

(The telegram dated March 3, 1930, was thereupon by the Commissioner marked, "Respondents' Exhibit E.")

Mr. SAPIRO: Now, that will be all that we have except the question I asked regarding his testimony at the last hearing, and we will have to go back to the record on that.

The COMMISSIONER: We will take a recess while you look that up.

(Whereupon a short recess was had.)

Mr. GRAHAM: I will now offer in evidence,

(Testimony of R. S. Wintemute.)

Mr. Commissioner, as Respondents' Exhibit F, the telegram sent to Mr. Van Bokkelen on March 3rd in answer to the wire received from him on the same date, and I will also offer in evidence as Respondents' Exhibit G, the letter dated January 13th addressed to the Pacific Egg Producers.

(The documents were marked "Respondents' Exhibits F and G".)

Mr. GRAHAM: Now, Mr. Sapiro, will you go ahead?

Mr. SAPIRO: Q. Mr. Wintemute, when you were examined the other day by Mr. Graham he asked you a question similar to this effect: Is it customary to deliver sailing schedules showing changes from day to day, and you replied, yes. Do you remember that question and answer?

A. Now that you bring it to my attention I think so, yes.

Q. Will you explain what you meant by that?

A. What I meant by that was that we issued regular printed schedules, such as we have on exhibit here, from time to time. I thought Mr. Graham asked me afterwards how often they were issued, and I think I said we maybe issued them once a month, or maybe once every two or three months, or even four months periods.

Q. Do you remember when you changed this particular sailing [307] schedule which we have been referring to in this hearing?

Mr. GRAHAM: This printed form?

(Testimony of R. S. Wintemute.)

Mr. SAPIRO: Yes.

The WITNESS: Have we issued them since then?

Mr. SAPIRO: Q. Maybe you can answer it in this way. Do you remember whether, prior to March 10, for instance, you issued any other printed schedule in reference to the vessels referred to on this particular printed schedule, which was introduced in evidence as Libelants' Exhibit 1?

A. You mean between the period of the date of that exhibit, and, say, March 10th?

Q. Yes. A. I am sure we did not.

Q. Now, this boat loaded on, I believe, April 8th—I believe that is the stipulation, isn't it?

Mr. GRAHAM: I don't know.

Mr. SAPIRO: It arrived in San Francisco for loading on April 8th?

Mr. GRAHAM: When it arrived in San Francisco?

Mr. SAPIRO: Yes.

Mr. GRAHAM: We have got it here.

Mr. SAPIRO: Q. Do you know when she began loading, Mr. Wintemute?

Mr. GRAHAM: April 8th to April 10th.

Mr. SAPIRO: Q. So she began loading probably sometime on the 8th or 9th?

A. Probably on the 8th, unless she arrived on the evening of the 8th.

Mr. SCHULZ: She got in at 8:30 on the evening of the 8th.

(Testimony of R. S. Wintemute.)

The WITNESS: Then she commenced loading on the 9th.

Mr. SAPIRO: Q. The bills of lading for the various goods that were taken aboard the vessel,—when would they be issued? [308]

A. I don't know when those were actually issued. I can't say when we actually issued them by looking at them. They are gotten out, or made up—they are typewritten by the supplier or shippers of the eggs themselves, and they would naturally make them out at the time the ship was loading. We wouldn't sign them—in some cases we might sign them before the goods were aboard and sometimes not until after they were aboard.

Q. That is, they are not signed by you until after the goods are put aboard the ship?

A. Not necessarily; it depends on the commodity and the nature of the bill of lading.

Q. Those are made out sometimes by shipping brokers also, are they not?

A. Yes; they may be made out by shipping brokers or the shippers themselves.

Q. And then the ship signs them after the goods are loaded?

A. After the goods are in its possession, generally.

Mr. SCHULZ: Q. Do you know if in connection with these shipments the bills of lading were signed after the goods were on board or before?

A. I don't recall.

Mr. GRAHAM: May I ask a question in there,

(Testimony of R. S. Wintemute.)

Mr. Sapiro?

Mr. SAPIRO: Sure.

Mr. GRAHAM: Mr. Schulz, I would like to ask Mr. Wintemute a question,—whether you know in this case whether the bills of lading were signed before the goods were put aboard the vessel?

The WITNESS: No, I do not.

Mr. GRAHAM: Q. Do you ever sign any bills of lading before you have the goods in your possession?

A. Not before we receive the goods.

Mr. SCHULZ: Q. What do you mean by "receive the goods"?

A. When they are in our possession on the dock. [309]

Q. What is the custom as to the time the bills of lading are signed with relation to the loading? Do you usually sign them after the goods are loaded on the vessel or before the goods are loaded on the vessel?

Mr. GRAHAM: I think, Mr. Schulz, he has already covered that.

Mr. SCHULZ: I think so.

Mr. GRAHAM: But if you don't think he has, go on.

The WITNESS: We usually sign them after the goods are aboard the vessel.

Mr. SAPIRO: That was all.

Mr. GRAHAM: I have just a few more questions, on matters I want to clear up, Mr. Wintemute.

(Testimony of R. S. Wintemute.)

Redirect Examination.

Mr. GRAHAM: Q. These letters that Mr. Sapiro has questioned you about, dated the 13th and 27th of January, giving options to the Pacific Egg Producers, did you write those letters yourself?

A. I did not.

Q. In connection with the Guide, do you rely on the Guide at all in getting accurate information as to the sailing schedules of vessels?

A. No, sir.

Q. This schedule that you made up in November, Mr. Wintemute, on what information was it based at that time?

A. It was based on the best information we had at the time.

Q. And in indicating the number of days that are indicated on there, what did you take into consideration?

A. We took into consideration of a possible call at four ports en route, after leaving Los Angeles.

Q. And at that time did you know how many ports the vessel would call at?

A. No, we did not. [310]

Q. Did you know how much cargo she would have for any of the ports? A. We did not.

Q. At that time did you have any cargo booked at all, in November, 1929?

A. We may have had some preliminary bookings for the first shipments via the Brimanger.

Q. But you didn't have any for the Villanger or the Hindanger? A. No, sir.

(Testimony of R. S. Wintemute.)

Q. Prior to the time that the bills of lading were issued and signed by you, or by the vessel, did you have any contract with these libelants at all?

Mr. SAPIRO: We will object to that as calling for the opinion and conclusion of the witness and I may remind the Commissioner that he has already ruled out the same question the other day.

The COMMISSIONER: Yes, I will sustain the objection.

Mr. GRAHAM: Q. But if this shipment had not been made on the Hindanger, this shipment of 15,000 cases, to whom would you have looked to collect the dead freight?

A. I would look to Mr. Van Bokkelen——

Mr. SAPIRO: I object to that as incompetent, irrelevant and immaterial.

Mr. GRAHAM: I think it is very competent, your Honor. This witness has already testified with respect to negotiations with certain individuals and the fact that he did not have a contract with either individual, and I think the question of reciprocal rights is very pertinent.

Mr. SAPIRO: The witness has not testified with whom he had the contract, because that is for the court to determine, the question of who he is to look to for dead freight, that is a legal conclusion. [311]

The COMMISSIONER: Read the question.

(Question read.)

The COMMISSIONER: Yes, the objection is sustained.

Mr. GRAHAM: That is all.

(Testimony of R. S. Wintemute.)

Recross-Examination.

Mr. SAPIRO: Q. Did you, in preparing that schedule, take into consideration the speed of the vessel between the ports, Mr. Wintemute?

A. Yes, sir.

Q. And what information did you have as to the sailing time between the ports?

A. We had the distance.

Q. The distance?

Mr. GRAHAM: You mean the speed of the vessel?

Mr. SAPIRO: Yes.

The WITNESS: We knew what the approximate speed of the vessel was.

Mr. SAPIRO: Q. And you figured at what time she would do it in, 31 days, didn't you?

A. Conditions beyond her control permitting, yes, weather conditions, and other conditions, such as cargo conditions, certainly.

Q. Do you know what the running times had been for that vessel?

A. As I said before, this schedule is made up almost at the start of this service through the Panama Canal. As a matter of fact, I think only one ship had sailed at that time, so all we could do was to take the distance between the ports and the speed of the vessel and figure it out.

Q. So that on the ordinary speed of the vessel that would have taken 31 days for the vessel to

(Testimony of R. S. Wintemute.)

make that run under normal conditions, weather conditions?

Mr. GRAHAM: You mean, going from port to port without stopping at the ports?

Mr. SAPIRO: Yes; without taking into consideration these [312] times for stopping.

The WITNESS: Yes.

Mr. SAPIRO: Q. The shippers rely on the Guide, don't they?

Mr. GRAHAM: Just a minute. I object to that. This witness doesn't know what the shippers rely on.

The COMMISSIONER: Yes, the objection is sustained.

Mr. SAPIRO: All right. That is all.

Mr. GRAHAM: Mr. Bybee.

RALPH BYBEE,

called as a witness, by the respondents, sworn:

The COMMISSIONER: Q. What is your name? A. Ralph Bybee.

Q. And your address?

A. 215 Market Street, San Francisco.

Direct Examination.

Mr. GRAHAM: Q. By whom are you employed, Mr. Bybee?

A. McCormick Steamship Company.

(Testimony of Ralph Bybee.)

Q. Are you the foreign freight agent of the McCormick Steamship Company? A. Yes, sir.

Q. How many years' experience have you had as foreign freight agent?

A. As foreign freight agent——

Q. Well, how many years' experience have you had in the steamship business? A. Ten years.

Q. Are you familiar with the east coast of South American and west coast of North American trade?

A. Yes, sir.

Q. In that trade does the McCormick Steamship Company operate a fleet of vessels? A. Yes, sir.

Q. Now, are those vessels in competition with the Westfal-Larsen Company Line?

A. They are. [313]

Q. Do you run to and from substantially similar ports as the Westfal-Larsen Company Line vessels operate to? A. Yes, sir.

Q. What kind of ships are those which you operate?

A. General cargo and refrigerator ships.

Q. And have you both refrigerator and non-refrigerator ships? A. Yes, sir.

Q. Are they the same general class of ships as those operated by the Westfal-Larson Company Line and the General Steamship Corporation?

A. Yes, sir.

Q. Is there any difference in the schedule and ports of call of refrigerator and non-refrigerator ships in this service? A. No, sir.

Q. As between ships? A. No, sir.

Q. Do you remember carrying a shipment of eggs to Buenos Aires on the West Ira in 1930?

A. Yes, sir.

Q. Do you remember how many cases of eggs you had? A. For where?

Q. From the North Pacific Coast to Buenos Aires? A. 4725 cases, I think.

Q. 4725 cases? A. Yes, sir.

Q. Did you have any other eggs in that compartment? A. Yes.

Q. How many cases of eggs did you have?

A. 275.

Q. Making a total of 5000? A. Five thousand.

Q. Is that the capacity of the ship? A. Yes.

Q. Do you know the ports of call and the dates of arrival and departure at the various ports, of the West Ira? A. Approximately, yes.

Mr. SAPIRO: I don't know what the relevancy of all this is.

The COMMISSIONER: I don't, either; but he may develop it.

Mr. GRAHAM: I will develop it, your Honor. [314]

The COMMISSIONER: It will go in subject to your motion to strike, if it is not connected up.

Mr. GRAHAM: The relevancy of it is that the witnesses for the libelant have testified that they shipped eggs over that line on the vessels of the McCormick Steamship Line, and this witness is a member of that line.

(Testimony of Ralph Bybee.)

Mr. SAPIRO: But what has that got to do with the shipments on this line?

Mr. GRAHAM: You will find out.

The COMMISSIONER: Go ahead.

Mr. GRAHAM: Q. Can you tell me, Mr. Bybee —or, I show you a statement which I hand you, and will ask you if that is a correct statement of the various times of arrival and departure at the various ports on that voyage of the West Ira, on which you carried eggs to Buenos Aires?

A. Yes, sir.

Q. And that shows a schedule of 46 days to Buenos Aires, does it? A. From San Francisco?

Q. Yes. A. Yes.

Q. Prior to the shipment of the eggs—I will offer this in evidence as the next exhibit in order, Respondents' Exhibit H. Prior to the shipment of these eggs on the West Ira, with whom did you have dealings in connection with the shipment of those eggs? A. With Mr. Van Bokkelen.

Q. And did you indicate to him the approximate time that it would take for those eggs to go to Buenos Aires? A. Yes, sir.

Q. How many days did you tell him, approximately?

A. Well, from 42 to 48 days—about 45 days average.

Q. Depending on what?

A. Well, cargo offering, where the boat is to load, and the destination.

Q. Now, do you know in advance, or far in ad-

(Testimony of Ralph Bybee.)

vance, the approx- [315] imate time of sailing at all the ports, and the length of the stay in each port?

A. Not exactly, no.

Q. That depends upon the conditions which you have testified about? A. Yes.

Q. Do you ever give any guarantee of the date of arrival of vessels at the various ports in this service? A. No, sir.

Mr. SAPIRO: We will object to that as incompetent, irrelevant and immaterial.

The COMMISSIONER: He has already answered it.

Mr. SAPIRO. I move that the answer be stricken.

The COMMISSIONER: It may go out.

Mr. GRAHAM: Q. Have you ever carried any eggs for the Washington Cooperative Egg & Poultry Association, or the Pacific Egg Producers or the Poultry Producers of Central California to Peru or Chili? A. No, sir.

Mr. GRAHAM: I think that is all.

Cross-Examination.

Mr. SAPIRO: Q. Did you say that you took from 42 to 48 days—— A. Yes, sir.

Q. ——or 45 days?

A. I said from 42 to 48. It averages about 45 days.

Q. And you told that to the shippers, did you?

A. Yes.

(Testimony of Ralph Bybee.)

Mr. GRAHAM: Q. Including these shippers?

A. Yes.

Mr. SAPIRO: Q. If you received a statement such as that— (handing witness Libelants' Exhibit No. 1)—from that steamship company, how long would you think—or how long would that tell you the boat would take to go from San Francisco, for instance, the Hindanger, to Buenos Aires?

A. It would depend on when I received the schedule.

Q. I know. But how long would that tell you the boat would [316] take?

A. From San Francisco, 32 days.

Q. Do you have any schedules like that?

A. Yes, sir.

Q. Do those schedules show that your vessel makes the run in 42 to 48 days?

A. They did, yes, sir.

Q. But your voyages are for schedules on a different route, weren't they? A. Yes.

Q. You went to Porto Rico? A. Yes.

Q. And these boats don't go to Porto Rico?

A. Not that I know of, no, sir.

Q. They were not at that time, in 1930,—they were not calling at Porto Rico? A. No.

Q. But that was a regular port of call for your boats, was it not? A. Yes, some of them.

Q. Well, was it for the West Ira? A. Yes.

Mr. SAPIRO: No further questions.

(Testimony of Ralph Bybee.)

Redirect Examination.

Mr. GRAHAM: Q. I have just one more question. If you received a schedule such as that shown to you by Mr. Sapiro, issued in November, 1929, covering the sailing of vessels in March and April of 1930, would you place any reliance on it at all as to the sailing date or arrival dates?

A. If it was mailed out in November I wouldn't place much reliance on it after December.

Mr. GRAHAM: That is all.

Recross-Examination.

Mr. SAPIRO: Q. That is, as to the time the boat was to leave, but you would still rely on the time it would take for the boat to go on the journey, wouldn't you? A. No, sir.

Q. If you got the same information in a letter of January 27th, would it not confirm the same time, practically?

A. You mean [317] for that same shipment.

Q. For the same distance, from San Francisco to Buenos Aires?

A. If I get the letter a few days prior to the date of sailing I would depend on it, otherwise I would not.

Q. You would not depend on it as a shipping man? A. No.

Q. But you don't know what the shipper would do?

A. Well, my experience has been they don't depend on it very much.

(Testimony of Ralph Bybee.)

Q. When they ask you how long it takes for a vessel to make a voyage and you tell them, do you think they depend on it? A. Yes, sir.

Q. When you represent to your shippers it would take from 42 to 48 days for your boat to make the voyage, do you think they depend on that?

A. Yes, sir.

Q. They do depend on that?

A. Yes: when they ask me prior to or close to the time of departure of the ship: but if they asked me, on the West Ira, in November, how long it would take it to go to Buenos Aires, I would probably have told them it took 34 days.

Q. What would you have told them in January?

A. I would probably have told them the same thing.

Q. When would you have changed the time?

A. When the boat was booked—when we had bookings on the boat.

Q. Would you volunteer that information to them?

A. If they asked me, yes.

Q. But suppose they didn't ask you, and you had previously informed them the ship would take a shorter time?

A. You mean on refer cargo or general cargo?

Q. On refer cargo?

A. I would probably tell them.

Q. You know, as a matter of fact, Mr. Bybee, on refer cargo they are interested in time very vitally, are they not, gener- [318] ally?

(Testimony of Ralph Bybee.)

A. As a rule, yes.

Q. And they would be in the matter of eggs also? A. Yes, I would say so.

Mr. SAPIRO: That is all.

The COMMISSIONER: How about that statement you offered in evidence?

Mr. GRAHAM: I am waiting to have it marked, Mr. Commissioner, please.

The COMMISSIONER: This will be Respondents' Exhibit H.

Mr. SAPIRO: We will object to Exhibit H as immaterial.

The COMMISSIONER: Objection overruled.

Mr. GRAHAM: Mr. Reali.

CHARLES REALI,

was thereupon called by the respondents, sworn:

Direct Examination.

Mr. GRAHAM: Q. Please state your name?

A. Charles Reali.

Q. You are assistant to Mr. Wintemute, in the employ of the General Steamship Corporation, are you not? A. Yes.

Q. How long have you been there?

A. About 12 years.

(Testimony of Charles Reali.)

Q. And during all that time have you been engaged in the handling of traffic for the General Steamship Corporation?

A. About 11 years of that, yes, sir.

Q. And in acting as assistant to Mr. Wintemute, you are engaged in handling traffic in the east coast South American trade? A. Yes, sir.

Q. During 1929 and 1930 did you have some correspondence with the Pacific Egg Producers?

A. I did.

Q. I show you a letter dated January 27th, which has already [319] been offered in evidence as Libelants' Exhibit 2, and will ask you if you wrote that letter?

A. Yes; that is my signature.

Q. And will you tell me what called forth the writing of that letter?

A. A memorandum which we received from Miss Hunt of the Pacific Egg Producers.

Q. And is that memorandum attached to the copy of the letter which I show you? A. It is.

Q. Is that the memorandum? A. Yes, sir.

Mr. GRAHAM: I offer it in evidence as the next exhibit in order, Respondents' Exhibit I.

Mr. SAPIRO: No objection.

(The document was so marked.)

Mr. GRAHAM: Q. And you say that memorandum called forth the writing of the letter, which you wrote on January 27th? A. Yes.

Q. And did you also write a previous letter on

(Testimony of Charles Reali.)

January 13th, which I show you, which has been marked Respondents' Exhibit G?

A. Yes, sir, I did.

Q. Did both of those letters have to do with options for shipments of eggs on the Westfal-Larson Company Line vessels? A. That is right.

Q. Were those options ever exercised?

A. No, sir.

Mr. SAPIRO: We object to that and we will ask that the answer go out so we can make our objection to the question as calling for the conclusion of the witness. The conduct of the parties is the best evidence.

The COMMISSIONER: That is true.

Mr. GRAHAM: May it please your Honor, I think this witness knows whether the options he gave to these people himself were ever exercised or not. He would be the very man in the employ of the General Steamship Corporation who would know [320] whether or not the options were ever exercised.

The COMMISSIONER: Did they ever respond to them? A. They did not.

The COMMISSIONER: All right.

Mr. GRAHAM: Q. Mr. Reali, did you make an examination of the files of the Guide, published in San Francisco, to determine the advertisements showing the sailing schedule of the Steamer West Ira of the McCormick Steamship Line, at my request? A. Yes, sir.

Q. I will show you a document and will ask

(Testimony of Charles Reali.)

you if that correctly indicates the result of your investigation and examination of the Guide?

A. Yes, sir; as listed in the Guide.

Mr. GRAHAM: I will offer this in evidence as Respondents' Exhibit J.

Mr. SAPIRO: I object to it on the ground that it is not material in this particular proceeding.

The COMMISSIONER: I don't think it is very material, but I will allow it. I will mark it Respondents' Exhibit J.

Mr. GRAHAM: Q. Did you have any conversation with any of the parties in this litigation representing that the Hindanger would arrive in Buenos Aires in 35 days, or make the voyage in 35 days? A. No, sir.

Mr. GRAHAM: I think that is all.

Cross-Examination.

Mr. SAPIRO: Q. Did you believe the statement in your letter of January 27th that the Hindanger would leave San Francisco on March 24th and arrive at Buenos Aires on or about April 28th?

A. At that time I did.

Q. Then you intended to convey to the Pacific Egg Producers the information, did you not, that the voyage would [321] take thirty-five days?

A. Yes; based on the position of the ship, the speed of the ship, as well as the ports of call at that time.

Q. You didn't make any mention of that in that letter, did you? A. No.

(Testimony of Charles Reali.)

Q. You intended, then, to convey the information to the Pacific Egg Producers that the voyage would take 35 days?

A. As I stated before, based on the——

Q. You intended, then, just to convey that information, didn't you?

Mr. GRAHAM: Just a minute. I think the witness should have a chance to explain his answer. Go ahead, Mr. Reali, and explain your answer.

A. (continuing) ——based on the speed of the ship and the cargo booked at that time.

Mr. SAPIRO: Q. Based on your knowledge of the speed of the ship and the cargo booked?

A. At that time.

Q. And you intended to let them know that the vessel would do the voyage in 35 days? A. Yes, sir.

Q. You didn't tell them anything about the limitations that were in your mind, did you?

A. What do you mean by "limitations"?

Q. You didn't tell them it was subject to the matter of cargo and the position of the ship; you didn't write that in that letter, did you?

A. Well, no, I didn't write it in the letter.

Q. Did you ever tell that to anybody?

A. I did.

Q. To whom? A. To Miss Hunt.

Q. Then you did have a conversation in reference to the length of the voyage?

A. The approximate time in transit, yes.

Q. What did you tell her was the approximate time in transit? [322]

(Testimony of Charles Reali.)

A. Based on that letter——

Q. What did you tell her was the approximate time in transit—thirty-five days?

A. Approximately thirty-five days.

Q. What did you mean when you said just a moment ago in answer to Mr. Graham that you never represented in any conversation that the Hindanger would make the voyage in 35 days?

A. He didn't ask me that. I answered the question he asked me. I believe——

Q. He didn't ask you that?

A. No. He asked me—I thought he was asking me about the parties in the litigation. I meant to say I had not talked with the parties to the litigation.

Q. Oh, so you meant to say that you never talked to the Poultry Producers of Central California? A. I did not.

Q. Or to the Washington Cooperative Egg & Poultry Association. A. No, sir.

Mr. GRAHAM: My question, Mr. Sapiro, was limited solely to those parties.

The WITNESS: That is what I understood.

Mr. GRAHAM: You understood correctly.

Mr. SAPIRO: That is all.

(Thereupon an adjournment was taken until Tuesday, May 24, 1932, at the hour of 2 o'clock P. M.)

[Endorsed]: Filed Oct. 22, 1932. Walter B. Maling, Clerk. [323]

Thursday, May 26, 1932.

RALPH V. DEWEY,

called for respondents, sworn:

Mr. GRAHAM: Q. With whom are you associated, Mr. Dewey? A. Otis, McAllister & Co.

Q. How long have you been associated with them? A. A little over eleven years.

Q. Does your firm handle one of the largest exporting businesses to San Francisco?

A. I think it is so considered.

Q. Are you familiar with the habits and customs of the trade to South America, particularly to Buenos Aires? A. Yes.

Q. Are you engaged in shipping general merchandise and perishables to that market?

A. Yes, to all parts of that market.

Q. Are you familiar with the service of the Westphal-Larsen and the McCormick Lines?

A. Yes.

Q. Are you familiar with the schedules and ports of call and the lengths of voyages of the vessels of those two lines?

A. More or less as they alter them from time to time.

Q. I show you a printed schedule, Libelants' Exhibit 1, and ask you if you received a schedule similar to that from them?

A. Yes, we are on the mailing list and we get all of the schedules, I think.

Q. If you received a schedule such as this, Libelant's Exhibit 1, dated November, 1929, and if you

(Testimony of Ralph V. Dewey.)

had in mind making shipments on the Hindanger, would you place any reliance on the times of departure, arrival, or length of voyage as shown on that schedule of the "Hindanger"?

Mr. SAPIRO: I object to that as immaterial, irrelevant, and incompetent. This man's opinion as to what he would do, or his knowledge of the lack of reliability on shipping schedules is not material. [324]

The COMMISSIONER: Well, I think that goes to the weight of the evidence. I will allow it.

Mr. SAPIRO: I don't see how it is of any materiality, your Honor.

The COMMISSIONER: It is not very material. It simply goes to the weight of it.

A. I would rely on it as an intimation only, and if I were going to make a shipment I would check with the steamship company as to current dates.

Mr. GRAHAM: Q. Being familiar with the export trade, as you have testified you are, do you know whether the export trade would place any reliance on such a schedule, any further than you have testified you would place any reliance on it?

Mr. SAPIRO: The same objection.

The COMMISSIONER: The same ruling.

A. I think no more.

Mr. GRAHAM: Q. I show you a copy of a letter dated January 27, 1930, Libelant's Exhibit No. 2, and ask you if you will read to yourself the

(Testimony of Ralph V. Dewey.)

first paragraph in reference to the steamer "Hindanger"? A. I have read it.

Q. If you received such a letter as that, dated as it is, and had in mind making shipments on the "Hindanger" on March 24th, would you place any reliance on the statement as to time of departure and arrival, as shown there?

Mr. SAPIRO: The same objection.

The COMMISSIONER: The same ruling.

A. As between January 27 and March 24 I certainly would not rely on it as authentic information without checking further.

Mr. GRAHAM: Q. How would you get that further information as to dates, schedule, and length of voyage?

Mr. SAPIRO: Just a moment. That was not the last answer [325] the witness made.

Mr. GRAHAM: I would like to have the record read.

(Record read.)

Q. What would your answer be as to the schedule of the vessel? You have limited your previous answer as to departure and arrival.

A. You mean the length of the voyage, do you?

Q. The length of the voyage.

A. Well, as to the length of the voyage also, because ships of that line and others to South America have optional ports, if inducements offer, and those things change from day to day. Naturally, each additional port means additional time.

(Testimony of Ralph V. Dewey.)

Q. Did you have cargo on the "Hindanger" shipped by Otis-McAllister?

A. I presume we did.

Q. The manifest will show if you did?

A. Yes. We are shipping all the time, and I presume it was one of our carriers.

Mr. GRAHAM: That is all.

Cross-Examination.

Mr. SAPIRO: Q. Do you buy eggs?

A. We do sometimes.

Q. Do you buy them for export, sometimes?

A. Yes.

Q. Do you insist on the time of delivery to the boat as important when you make a contract of purchase? A. Naturally.

Q. Do you regard that as a set thing?

A. We regard the sailing of the ship as important, which is subject to change, of course, in certain services.

Q. If the shipping company tells you that the vessel makes a trip in 32 or 35 days, do you rely on that as at all accurate?

A. As an intimation only.

Q. You do not frame any of your market contracts or positions based on that information?

A. No, because we are not concerned selling at destination; the buyer takes that risk, as far as we are concerned. [326]

Q. Do you transmit your information to the buyer? A. He has it at that end.

(Testimony of Ralph V. Dewey.)

Q. Do you ever transmit it? A. Occasionally.

Q. When you transmit it, do you expect him to believe it? A. Only as an indication.

Q. How far off do you expect it to be?

A. That, again, depends on his knowledge of the type of service to which he is accustomed.

Q. How about your knowledge?

A. Our knowledge would depend on the experience of the ships, which have varied in that trade from—I don't know of any faster than thirty days, up to as much as sixty days.

Q. Suppose a company comes and tells you that they have a ship making 32 to 35 days, would you believe them?

A. I would believe that that was their intention.

Q. In making your shipments, would you govern yourself by the information given to you?

A. Up to that point where we would take no responsibility for deviation or delay.

Mr. SAPIRO: That is all.

Mr. GRAHAM: The defense rests.

Mr. SAPIRO: The loading date at Seattle does not appear here. It was understood that that would be stipulated. Have you that date? Apparently, by some omission, it was left out of the stipulation.

Mr. GRAHAM: The arrival date of the "Hindanger" in Seattle was March 27 and she sailed March 28.

(Testimony of Ralph V. Dewey.)

Mr. SAPIRO: That is stipulated, is it?

Mr. GRAHAM: Yes. That is what the record shows. I don't know whether it is true, or not, but that is what the record shows.

Mr. SAPIRO: We just want what your record shows. [327]

JOHN LAWLER,

recalled for libelant.

Mr. SAPIRO: Q. Who paid the freight on the eggs shipped by the Poultry Producers of Central California? A. We did.

Q. That is, the Poultry Producers of Central California did? A. Yes.

Q. Who paid the freight on the eggs shipped by the Washington Cooperative Egg & Poultry Association? A. They did.

Q. I think the other day Mr. Graham asked you some questions about previous shipments made to South America, and you were testifying from recollection, and you said you had made some down the West Coast. A. Yes.

Q. I think at that time you stated that it was on the McCormick Line. A. Yes.

Q. Did you check that? A. I did.

Q. What line was it on? A. The Grace Line.

Q. You are familiar with the quantity of eggs and the general production situation as it existed in 1930? A. Yes.

(Testimony of John Lawler.)

Q. You are also familiar with the situation, are you not, for a period of years as to the general production of eggs in California, Washington, and elsewhere? A. Yes, I am.

Mr. GRAHAM: Your Honor, I don't know what the purpose of this testimony is.

Mr. SAPIRO: Will you stipulate that this witness will qualify as an expert in these matters?

Mr. GRAHAM: Oh, yes. I have not any objection to his qualifications.

Mr. SAPIRO: Q. From your knowledge of the production conditions, and the quantity of eggs available, would it have been possible to have had the quantity of eggs that was shipped on the "Hindanger" available for shipment on or about March 5, when the [328] "Villanger" sailed?

A. No, it would not.

Mr. GRAHAM: Just a moment. I object to the question and move to strike out the answer. I think the question of whether it would have been possible is immaterial in this case. We are talking about shipments on the "Hindanger." There is no question one way or the other of the availability of eggs for shipment on the "Villanger."

Mr. SAPIRO: I think that goes more to the weight of the testimony as to what was discussed in these conferences.

The COMMISSIONER: I will allow it.

Mr. SAPIRO: That is all.

Mr. GRAHAM: No questions.

Mr. SAPIRO: We have the bills of lading showing the shipment of the greater quantity of these eggs from Santa Rosa on or about April 8th, so that they were received here on the 9th. Do you want to examine on that, Mr. Graham, or will you stipulate?

Mr. GRAHAM: I don't think that those would be admissible. On what ground would they be admissible?

Mr. SAPIRO: We want to show when they were received here on the dock.

Mr. GRAHAM: That is not a question in this case. The question here is, what is the relationship between these carriers and the libelant?

Mr. SAPIRO: Under the testimony of Mr. Wintemute, that the bill of lading is not issued until after the goods are generally aboard, we just wanted to show that the bill of lading was not issued at that time. It was not issued on the date that it bears, which is April 7th.

Mr. GRAHAM: I think Mr. Wintemute testified, and from my knowledge of the shipping business the fact is, that the bill of lading is made up by the shippers. [329]

Mr. SAPIRO: It is made by the customs broker.

Mr. GRAHAM: The date there is unquestionably the date put on it by the shipper, or by a broker. I have not any information on that. I do not think that the rail bills of lading are material evidence in the case.

Mr. SAPIRO: I don't want to put in the bills

of lading, because I know that they will encumber the record. I simply want you to stipulate that these eggs were shipped from Santa Rosa, and arrived on the dock at about the 9th of April.

Mr. GRAHAM: I cannot stipulate to that, but I will give you a copy of the lading records and if you want we will put that record in. That will give you the exact dates, since there appears to be some question about the dates on the bills of lading.

Mr. SAPIRO: I will ask that this be marked Libelants' Exhibit 4.

Mr. GRAHAM: Libelant's Exhibit 4 indicates the various shipments that went to make up the total shipment of eggs from the San Francisco area on the "Hindanger". It is my understanding that Mr. McCurdy would testify, if called, that the dates indicated on the exhibit are the dates of shipment of the eggs from the places indicated, and that the eggs, in fact, would arrive in San Francisco on the following day from the day indicated.

Mr. SAPIRO: And that this pencil correction on Libelant's Exhibit 4, showing 4/7 and 4/8, on the steamer "Gold," meaning April 7th and April 8th, refers to two separate shipments.

Mr. GRAHAM: Mr. McCurdy would testify to that.

Mr. SAPIRO: We submit the case.

(Thereupon, by consent, the case was submitted on briefs to be filed in 5, 5, and 5, after receipt of the transcript of testimony.) [330]

[Endorsed]: Filed Oct. 22, 1932. Walter B. Maling, Clerk. [331]

[Title of Court and Cause No. 20336-L.]

NOTICE OF APPEAL.

To the respondents above-named and to Messrs. Lillick, Olson and Graham, their proctors:

Please take notice that the libelant above-named hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that part of the final decree entered herein on March 22, 1933, ordering, adjudging and decreeing that respondents Westfall-Larsen & Co. and Motorship "Hindanger," her engines, boilers, tackle, etc., be without fault in the premises, and dismissing the libel herein as against said respondents Westfal-Larsen & Co. and Motorship "Hindanger," her engines, boilers, tackle, etc.

Dated: June 21, 1933.

CARL R. SCHULZ,
MILTON D. SAPIRO,
Proctors for libelant.

[Endorsed]: Receipt of copy of the within Notice of Appeal is hereby acknowledged this 21st day of June, 1933.

LILLICK, OLSON & GRAHAM,
Proctors for Respondents.

Filed June 21, 1933. Walter B. Maling, Clerk. [332]

[Title of Court and Cause No. 20337-L.]

NOTICE OF APPEAL.

To the respondents above-named and to Messrs. Lillick, Olson and Graham, their proctors:

Please take notice that the libelant above-named hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that part of the final decree entered herein on March 22, 1933, ordering, adjudging and decreeing that respondents Westfal-Larsen & Co. and Motorship "Hindanger," her engines, boilers, tackle, etc., be without fault in the premises, and dismissing the libel herein as against said respondents Westfal-Larsen & Co. and Motorship "Hindanger," her engines, boilers, tackle, etc.

Dated: June 21, 1933.

CARL SCHULZ,
MILTON D. SAPIRO,
Proctors for Libelant.

[Endorsed]: Receipt of copy of the within Notice of Appeal is hereby acknowledged this 21st day of June, 1933.

LILLICK, OLSON & GRAHAM,
Proctors for Respondents.

Filed June 21, 1933. Walter B. Maling, Clerk. [333]

[Title of Court and Cause No. 20336-L.]

ASSIGNMENT OF ERRORS.

Now comes Poultry Producers of Central California, a corporation, the above named libelant and appellant, and respectfully makes and files the following Assignment of Errors, which libelant avers occurred in said action during its pendency and in the decree of this court, upon which it relies to reverse said decree entered herein as appears of record:

1. The Court erred in dismissing the libel and in failing to enter a decree in favor of libelant for damages arising from the breach by respondents of the contract of affreightment set forth in the libel.

2. The Court erred in finding that the contract of carriage for the transportation of the shipment of eggs made on board the "Hindanger" by the libelant was evidenced by a written bill of lading issued to the libelant by respondent Westfal-Larsen & Co. and in finding that said bill of lading contained the terms of the contract for the transportation of [334] the shipment of eggs in that said finding is contrary to the evidence; said finding of fact was duly excepted to by libelant.

3. The Court erred in failing to find that the shipment of eggs herein sued upon was transported to Buenos Aires under an oral contract of affreightment between libelant and respondent Westfal-Larsen & Co.; the court's failure so to find was duly excepted to.

4. The Court erred in failing to find that the

bill of lading issued upon receipt of the eggs involved herein was issued by respondent Westfal-Larsen & Co. and received by libelant solely as a receipt and not as a contract of affreightment; the court's failure so to find was duly excepted to.

5. The Court erred in failing to find that on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Washington Cooperative Egg and Poultry Association, agreed to furnish, and respondents agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option upon the Motorship "Hindanger," for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle March 20, 1930, and from San Francisco April 2, 1930. The court's failure so to find was duly excepted to.

6. The Court erred in finding that for a period of some months prior to the aforesaid shipment, representatives of the libelant and respondents and/or their respective agents conferred in preliminary negotiations regarding space, rates, sailing [335] times, vessels, and other sundry matters concerning the general question of the shipment of eggs from the Pacific Coast of North America to the Atlantic Coast of South America, and particularly to Buenos

Aires; that none of these preliminary negotiations resulted in the consummation of any contract between the libelant and respondents other than that evidenced by the bill of lading covering the transportation of the goods shipped, for the reason that the evidence shows that the preliminary negotiations were part of the oral contract of affreightment as finally consummated on March 10, 1930, and for the further reason that there is no evidence to support any finding that the contract between libelant and respondents was evidenced by the bill of lading covering the transportation of the goods shipped. Said finding was duly excepted to.

7. The Court erred in finding that the ports at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that there is no evidence to show that the bill of lading constituted the contract of carriage between the parties. Said finding was duly excepted to.

8. The Court erred in finding that the port at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that the bill of lading contained no provisions applicable to shipments between ports of the United States and foreign ports relating to the voyage to be pursued. Said finding was duly excepted to.

9. The Special Master appointed by the court herein erred in finding that the rights of the parties

herein must be determined by the bill of lading issued at the time of the receipt [336] of the goods by respondents. Said finding was duly excepted to by libelant.

10. The Special Master erred in failing to find that the bill of lading issued upon receipt of said goods by respondents from libelant was issued solely as a receipt and did not constitute a contract of affreightment between the parties; to which failure to find libelant duly excepted.

11. The Special Master erred in failing to find that on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Washington Cooperative Egg and Poultry Association, agreed to furnish, and respondents agreed to transport not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "Hindanger", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco, April 2, 1930; to which failure to find libelant duly excepted.

12. That the Special Master erred in failing to find that thereafter and on or about the 18th day of March, 1930, respondents notified libelant that

said vessel would be ready to load at San Francisco about April 4, 1930, and in failing to find that said subsequent notification definitely fixed the date upon which said M/S "Hindanger" agreed to be ready to load at San Francisco; to which failure to find libelant duly excepted. [337]

13. That the Special Master erred in failing to find that said M/S "Hindanger" was not ready to load at San Francisco on April 4, 1930, and in failing to find that said M/S "Hindanger" did not arrive in San Francisco until April 8, 1930, at 8 P. M. and was not ready to load until April 9, 1930; to which failure to find libelant duly excepted.

14. That the Special Master erred in finding that said 11,000 cases of eggs were loaded on board said M/S "Hindanger" at San Francisco on or about April 7, 1930, and in failing to find that said 11,000 cases of eggs were loaded on board said vessel on April 9, 1930, and April 10, 1930; to which libelant duly excepted.

15. That the Special Master erred in failing to find that respondents breached said oral contract in the following respects:

(a) That said M/S "Hindanger" did not sail about April 2, 1930, from San Francisco, but sailed April 10, 1930, from San Francisco.

(b) That said M/S "Hindanger" was not ready to load at San Francisco on April 4, 1930, and was not ready to load until April 9, 1930.

(c) That said voyage was not of a duration of 35 days from San Francisco to Buenos Aires, as

agreed, but said voyage was of a duration of 49 days from San Francisco to Buenos Aires.

(d) That said vessel called at the ports of Pernambuco and Bahia, both in Brazil, contrary to said agreement.

(e) That said vessel remained at the port of Montevideo for eight days instead of one day as agreed.

To which failure to find libelant duly excepted.

16. That the Special Master erred in failing to find that the M/S "Hindanger" deviated from the agreed voyage in the same respects as respondents breached said oral contract as set [338] out in paragraph 8 hereof; to which failure to find libelant duly excepted.

17. That the Special Master erred in failing to find that respondents Westfal-Larsen & Co. and M/S "Hindanger" are liable to libelant for all damages caused libelant by reason of the aforesaid breaches of contract and deviations; to which failure to find libelant duly excepted.

18. That the Special Master erred in holding that the libel should be dismissed and respondents awarded costs of action.

19. That the Special Master erred in failing to award libelant its costs of action.

CARL SCHULZ,
MILTON D. SAPIRO,
Proctors for Libelant.

[Endorsed]: Filed Aug. 5, 1933. Walter B. Maling, Clerk. [339]

[Title of Court and Cause No. 20337-L.]

ASSIGNMENT OF ERRORS.

Now comes Washington Cooperative Egg and Poultry Association, a corporation, the above named libelant and appellant, and respectfully makes and files the following Assignment of Errors, which libelant avers occurred in said action during its pendency and in the decree of this court, upon which it relies to reverse said decree entered herein as appears of record:

1. The Court erred in dismissing the libel and in failing to enter a decree in favor of libelant for damages arising from the breach by respondents of the contract of affreightment set forth in the libel.

2. The Court erred in finding that the contract of carriage for the transportation of the shipment of eggs made on board the "Hindanger" by the libelant was evidenced by a written bill of lading issued to the libelant by respondent Westfal-Larsen & Co. and in finding that said bill of lading contained the terms of the contract for the transportation of the shipment of eggs in that [340] said finding is contrary to the evidence; said finding of fact was duly excepted to by libelant.

3. The Court erred in failing to find that the shipment of eggs herein sued upon was transported to Buenos Aires under an oral contract of affreightment between libelant and respondent Westfal-Larsen & Co.; the court's failure so to find was duly excepted to.

4. The Court erred in failing to find that the bill of lading issued upon receipt of the eggs involved herein was issued by respondent Westfal-Larsen & Co. and received by libelant solely as a receipt and not as a contract of affreightment; the court's failure so to find was duly excepted to.

5. The Court erred in failing to find that on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Poultry Producers of Central California, agreed to furnish, and respondents agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "Hindanger", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco April 2, 1930; the Court's failure so to find was duly excepted to.

6. The Court erred in finding that for a period of some months prior to the aforesaid shipment, representatives of the libelant and respondents and/or their respective agents conferred [341] in preliminary negotiations regarding space, rates, sailing times, vessels, and other sundry matters concerning the general question of the shipment of eggs from

the Pacific Coast of North America to the Atlantic Coast of South America, and particularly to Buenos Aires; that none of these preliminary negotiations resulted in the consummation of any contract between the libelant and respondents other than that evidenced by the bill of lading covering the transportation of the goods shipped, for the reason that the evidence shows that the preliminary negotiations were part of the oral contract of affreightment as finally consummated on March 10, 1930, and for the further reason that there is no evidence to support any finding that the contract between libelant and respondents was evidenced by the bill of lading covering the transportation of the goods shipped. Said finding was duly excepted to.

7. The Court erred in finding that the ports at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that there is no evidence to show that the bill of lading constituted the contract of carriage between the parties. Said finding was duly excepted to.

8. The Court erred in finding that the ports at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that the bill of lading contained no provisions applicable to shipments between ports of the United States and foreign ports relating to the voyage to be pursued. Said finding was duly excepted to. [342]

9. The Special Master appointed by the court herein erred in finding that the rights of the parties herein must be determined by the bill of lading issued at the time of the receipt of the goods by respondents; said finding was duly excepted to by libelant.

10. The Special Master erred in failing to find that the bill of lading issued upon receipt of said goods by respondents from libelant was issued solely as a receipt and did not constitute a contract of affreightment between the parties; to which failure to find libelant duly excepted.

11. The Special Master erred in failing to find that on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Poultry Producers of Central California, agreed to furnish, and respondents agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "Hindanger", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco April 2, 1930; to which failure to find libelant duly excepted.

12. That the Special Master erred in failing to

find that thereafter and on or about the 18th day of March, 1930, respondents notified libelant that said vessel would be ready to load at Seattle about March 24, 1930, and in failing to find that said subsequent notification definitely fixed the date upon which said M/S "Hindanger" agreed to be ready to load at Seattle; to which [343] failure to find libelant duly excepted.

13. That the Special Master erred in failing to find that said M/S "Hindanger" was not ready to load at Seattle on March 24, 1930, and in failing to find that said M/S "Hindanger" did not arrive in Seattle until March 27, 1930, at 8 P. M. and was not ready to load until March 27, 1930; to which failure to find libelant duly excepted.

14. That the Special Master erred in failing to find that respondents breached said oral contract in the following respects:

(a) That said M/S "Hindanger" did not sail about March 20, 1930, from Seattle, but sailed March 28, 1930, from Seattle.

(b) That said M/S "Hindanger" was not ready to load at Seattle on March 24, 1930, and was not ready to load until March 27, 1930.

(c) That said voyage was not of a duration of 48 days from Seattle to Buenos Aires, as agreed, but said voyage was of a duration of 62 days from Seattle to Buenos Aires.

(d) That said vessel called at the ports of Pernambuco and Bahia, both in Brazil, contrary to said agreement.

(e) That said vessel remained at the port of Montevideo for eight days instead of one day as agreed.

To which failure to find, libelant duly excepted.

15. That the Special Master erred in failing to find that the M/S "Hindanger" deviated from the agreed voyage in the same respects as respondents breached said oral contract as set out in paragraph 8 hereof; to which failure to find libelant duly excepted.

16. That the Special Master erred in failing to find that respondents Westfal-Larsen & Co. and M/S "Hindanger" are liable to libelant for all damages caused libelant by reason of the [344] aforesaid breaches of contract and deviations; to which failure to find libelant duly excepted.

17. That the Special Master erred in holding that the libel should be dismissed and respondents awarded costs of action.

18. That the Special Master erred in failing to award libelant its costs of action.

CARL SCHULZ,
MILTON D. SAPIRO,
Proctors for Libelant.

[Endorsed]: Filed Aug. 5, 1933. Walter B. Maling, Clerk. [345]

[Title of Court and Cause Nos. 20336-L and 20337-L.)

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the appeals being taken by the libelants in the above entitled cases may be consolidated for the purposes of appeal.

IT IS FURTHER STIPULATED that only one record need be filed on such appeal to cover both appeals and that the Apostles to be furnished as such sole record shall consist of the following papers and pleadings in said cases: [346]

A. In Case #20336-L, Poultry Producers of Central California vs. Motorship "Hindanger", etc. et al

1. Libel
2. Answer
3. Libelant's Exceptions to Answer
4. Minute Order overruling Libelant's exceptions to Answer
5. Notice of Overruling Exceptions to Answer
6. Stipulation for Release
7. Interrogatories Propounded by Respondents to Libelant to be Answered under Oath by Libelant
8. Answers to Interrogatories Propounded by Respondents.
9. Stipulation as to Facts
10. Report of Special Master
11. Libelant's Exceptions to Report of Special Master
12. Order Confirming Report of Commissioner

13. Findings of Fact and Conclusions of Law
14. Libelant's Proposed Exceptions to and Additions to Findings of Fact and Conclusions of Law
15. Decree
16. Notice of Appeal
17. Transcript of Hearing before Special Master
18. Depositions of Jens Hansen and Amund Utne
19. Assignment of Errors.

B. In Case #20337-L, Washington Cooperative Egg and Poultry Association vs. Motorship "Hindanger", etc. et al.

1. Libel
2. Answer
3. Libelant's Exceptions to Answer
4. Minute Order overruling Libelant's Exceptions to Answer
5. Notice of Overruling Exceptions to Answer
6. Stipulation as to Facts
7. Libelant's exceptions to Report of Special Master
8. Order Confirming Report of Commissioner
9. Findings of Fact and Conclusions of Law
10. Libelant's Proposed Exceptions and Additions to Findings of Fact and Conclusions of Law
11. Decree
12. Notice of Appeal
13. Assignment of Errors.

IT IS FURTHER STIPULATED that the bills of lading attached as exhibits to the Answers may be incorporated in the Apostles and the record on

appeal by inserting photographic copies thereof if the libelants so desire.

Dated this 25th day of July, 1933.

CARL R. SCHULZ,
MILTON D. SAPIRO,
Proctors for Libelants,
LILLICK, OLSON & GRAHAM,
Proctors for respondents. [347]

Upon stipulation of the parties, IT IS HEREBY ORDERED That for the purpose of the appeals in the above entitled actions the Appeals shall be consolidated and the Apostles shall consist of one record as hereinabove provided.

HAROLD LOUDERBACK,
District Judge.

[Endorsed]: Filed Aug. 2, 1933. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [348]

[Title of Court and Cause No. 20336-L.]

PRAECIPE.

To the Clerk of Said Court:
Sir:

Please prepare Apostles in the above entitled action in accordance with the notice of appeal heretofore filed and in accordance with the stipulation of

the parties to be filed herein providing for consolidation of actions #20336-L and #20337-L for the purpose of appeal, and the order of court authorizing the same. Said Apostles shall consist of the following papers and pleadings in said cases:

A. In case #20336-L, Poultry Producers of Central California vs. Motorship "Hindanger", etc. et al.

1. Libel
2. Answer
3. Libelant's Exceptions to Answer
4. Minute Order Overruling Libelant's Exception to Answer.
5. Notice of Overruling Exceptions to Answer
6. Stipulation for Release
7. Interrogatories Propounded by Respondents to [349] Libelant to be Answered under Oath by Libelant.
8. Answers to Interrogatories Propounded by Respondents.
9. Stipulation as to Facts.
10. Report of Special Master
11. Libelant's Exceptions to Report of Special Master
12. Order Confirming Report of Commissioner
13. Findings of Fact and Conclusions of Law
14. Libelant's Proposed Exceptions to and Additions to Findings of Fact and Conclusions of Law.
15. Decree
16. Notice of Appeal
17. Transcript of Hearing before Special Master

18. Depositions of Jens Hansen and Amund Utne

19. Assignment of Errors

B. In Case #20337-L, Washington Cooperative Egg and Poultry Association vs. Motorship "Hindanger", etc., et al.

1. Libel
2. Answer
3. Libelant's Exceptions to Answer.
4. Minute Order Overruling Libelant's Exceptions to Answer.
5. Notice of Overruling Exceptions to Answer
6. Stipulation as to Facts
7. Libelant's exceptions to Report of Special Master.
8. Order Confirming Report of Commissioner
9. Findings of Fact and Conclusions of Law
10. Libelant's Proposed Exceptions and Additions to Findings of Fact and Conclusions of Law.
11. Decree
12. Notice of Appeal
13. Assignment of Errors.

Dated:

CARL SCHULZ,
MILTON D. SAPIRO,
Attorneys for Libelant. [350]

[Endorsed]: Filed Aug. 5, 1933, 11:22 A. M. Walter B. Maling, Clerk. [351]

District Court of the United States, Northern District of California.

CERTIFICATE OF CLERK TO APOSTLES ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 351 pages, numbered from 1 to 351, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cases of Poultry Producers of Central Cal., vs. M/S "Hindanger", etc., No. 20336-L and Washington Cooperative Egg and Poultry Assn., vs. M/S "Hindanger", etc., No. 20337 (consolidated), as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Ninety Four Dollars and Forty Cents ($94.40) and that the said amount has been paid to me by the Attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 28th day of August, A. D. 1933.

[Seal] WALTER B. MALING,
Clerk,
By C. W. CALBREATH,
Deputy Clerk. [352]

[Endorsed]: No. 7275. United States Circuit Court of Appeals for the Ninth Circuit. Poultry Producers of Central California, a corporation, Appellant, vs. Motorship "Hindanger", her tackle, engines, boilers, etc., and Westfal-Larsen & Co., a corporation, Appellees, and Washington Cooperative Egg and Poultry Association, a corporation, Appellant, vs. Motorship "Hindanger", her tackle, engines, boilers, etc., and Westfal-Larsen & Co., a corporation, Appellees. Apostles on Appeals. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed August 28, 1933.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7275

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POULTRY PRODUCERS OF CENTRAL CALIFORNIA (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees,

and

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees.

BRIEF FOR APPELLANTS.

CARL R. SCHULZ,
Merchants Exchange Building, San Francisco,
MILTON D. SAPIRO,
Russ Building, San Francisco,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 7275

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POULTRY PRODUCERS OF CENTRAL CALIFORNIA (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees,

and

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

This is an appeal, heretofore consolidated by order of court, from decrees declaring respondents to be without fault and dismissing libels in each of the above cases.

The libels were filed by Washington Cooperative Egg and Poultry Association and by Poultry Producers of Central California, respectively, against the M/S "Hindanger", Westfal-Larsen & Co. and General Steamship Corporation, and were consolidated for trial and the consolidated action referred to a Commissioner, as Special Master, for the purpose of taking testimony and reporting to the court. The actions were dismissed as to respondent General Steamship Corporation at the trial but proceeded against the other respondents. The Special Master made his report which was confirmed by the District Court which made findings of fact and conclusions of law. Libelants duly excepted to the report and to the findings and conclusions of the court (89-93-106-111).*

Each of the libels sought to recover for the deviation and delay of the M/S "Hindanger" on a voyage to Buenos Aires, Argentina. The libel of the Washington Cooperative Egg and Poultry Association sets out a claim with reference to the transportation of 4000 cases of eggs from Seattle, Washington, to Buenos Aires and that of the Poultry Producers of Central California claimed with reference to 11,000 cases of eggs transported from San Francisco, California, to Buenos Aires. Both shipments moved on the same voyage of the "Hindanger". Libelants allege that each of these shipments moved under an oral contract of affreightment which was breached by respondents and each libel alleges that the "Hindanger" deviated on this voyage, by reason of which dam-

*Numbers in parenthesis refer to pages of the Apostles.

ages were sustained by libelants. The question of damages was not presented to the Special Master and an interlocutory decree only was sought.

Libelants Poultry Producers of Central California and Washington Cooperative Egg and Poultry Association are each cooperative marketing associations marketing eggs of their member producers. These associations marketed their eggs through a general selling agency known as Pacific Egg Producers, Inc. (259). For some months prior to the time these shipments moved on the "Hindanger" libelants, through their employees and their selling agent, Pacific Egg Producers, Inc., carried on negotiations looking forward to these shipments of eggs to be made to Buenos Aires. At these negotiations, the date of the departure of the ship and the duration of the voyage were important elements of discussion. It was necessary that these factors be known because of competitive conditions that would exist at different times in the egg market at Buenos Aires (255-257). The negotiations contemplated that these eggs would arrive at Buenos Aires early in May (225). If they arrived later, loss would result (256, 257). The representatives of respondents were informed of these market factors (227).

Prior to the first conference libelants were furnished with a sailing schedule showing the contemplated voyage of the "Hindanger" and were given options for space upon the "Hindanger" for a shipment to Buenos Aires on this particular voyage. (Exhibit 2.) In these options the vessel was represented as sailing March 24, 1930, from San Francisco

and arriving at Buenos Aires on or about April 28th. The next step in the negotiations was a conference of February 15, 1930, in which a thorough survey of the possibility of shipping these eggs on the "Hindanger" to Buenos Aires was made and the seasonal nature of the market was discussed (227). It was there agreed that the voyage would be a 35 day voyage (238, 252). As a result of this conference it was agreed that a shipment would be made on the "Hindanger" of approximately 15,000 cases of eggs to Buenos Aires (257) and at this conference all questions relating to the shipment were settled and agreed upon except the rate which was left open for future discussion. At that conference it was agreed that the "Hindanger" would sail the latter part of March (257). The schedule showed this to be March 24th. As a result of this conference, the sales manager of libelant Poultry Producers of Central California commenced assembling the eggs for shipment (257).

On March 8th one Walter Van Bokkelen discussed the question of rate with a Mr. Wintemute, who was vice-president of respondent General Steamship Corporation and authorized to negotiate for the respondents. Van Bokkelen did not own the eggs nor was he purchasing or shipping the same, but was merely to sell them in the Argentine (268 and 273). Such conference was had between Van Bokkelen and Wintemute and that as a result of that conference the rate at which these shipments were transported was agreed upon (297). This information was communicated to libelants (274). It is admitted that a confirmation from libelants to respondents was to fol-

low that conference (354). Mr. Wintemute, testifying on behalf of respondents, attempted to describe that confirmation as a confirmation that libelants would supply the eggs under an oral contract between respondents and Van Bokkelen (354). Libelants' witness, Mr. Lawler, who made the confirmation, testified that he confirmed a booking of space between libelants and respondents (270-278) which confirmation was acepted by Mr. Wintemute for respondents. This also appears from a letter sent by the General Steamship Company to the Pacific Egg Producers, Inc., the selling agent of libelants, wherein a confirmation of the booking is asked. (Exhibit "A".) At this time the date of the departure had been moved up to April 2nd (274). On March 18th a confirmation of booking was sent to Pacific Egg Producers, Inc., libelants' selling agent, which confirmation advised that the vessel would be ready to load March 24th at Seattle and April 4th at San Francisco. (Exhibit 3.) In fact the vessel loaded at Seattle on March 27th (388) and at San Francisco on April 9th (365).

The vessel arrived at Buenos Aires May 29th following a voyage of forty-nine days duration from San Francisco in which calls were made at Bahia and Pernambuco (81). The advertisement of respondents, published in the Guide, a publication in which the respondents advertised in order to convey information to the shippers (329), showed the vessel as calling at Rio de Janeiro, Santos, Buenos Aires and Montevideo, Rosario and Santa Fe (if inducements offer). The calls at Bahia and Pernambuco

were for the purpose of discharging kerosene and gasoline. (126, 128, Exhibit B.) The vessel remained at Montevideo for eight days discharging a cargo of benzine and other commodities. The only delay on the voyage caused by bad weather was about one day which was not unusual on such a voyage. The balance of the delay was the time taken in discharging cargo booked by respondents (136, 137).

Libelants made the shipments described above and were admittedly the owners of the eggs from the time of shipment until they were disposed of by libelants at Buenos Aires. Libelants paid the freight upon these shipments. Libelants thus performed everything to be performed under the contract. In their pleadings, respondents contended that there was no oral contract and that the bill of lading evidenced the only contract existing in the case and respondents denied that its issuance and execution was in pursuance of any oral contract (24). At the trial, however, respondents contended that the shipment was made under an oral contract between respondents and Van Bokkelen.

The issues presented to the Special Master were thus narrowed substantially to, first, whether the shipments moved under oral contracts of affreightment as claimed by libelants; second, whether those contracts were breached by respondents; and, third, whether the vessel deviated on this voyage.

In his report the Special Master found that there was no oral contract entered into between the parties because the various discussions did not result in a definite "meeting of the minds". He then held

that "in the absence of any oral agreement the rights of the different parties, including the question of deviation, must necessarily be determined by the bills of lading" and that under the bills of lading there was no deviation. The District Court signed findings prepared by respondents in which there was a finding of fact that the bill of lading evidenced the contract of the parties. There was no corresponding finding of fact in the Master's report. We will show that in permitting the bills of lading to determine the rights of the parties the Special Master and the court erred in its application of the law to the facts, and will then show libelants' right to recover.

SPECIFICATIONS OF THE ERRORS RELIED UPON IN SUPPORT OF THE APPEAL.

It is libelants' position that under the evidence there was absolutely no foundation for the finding that the bill of lading evidenced the contract of the parties or for the conclusion as a matter of law that it determined libelants' rights. Obviously, if the Special Master and the court below erred in their conclusion as to what constituted the contract of the parties, it becomes necessary that this court determine on all the facts of the record what did constitute that contract, since a proper determination of that question is indispensable to a correct disposition of the case.

The evidence in the case shows that the shipments moved under an oral contract of affreightment. The issue is really narrowed to the question as to whether

the contract was with libelants, who negotiated for the space for many months for the shipment, who were known to be the shippers, and who eventually did ship the eggs, pay the freight on them and accept delivery at Buenos Aires, or with one Van Bokkelen who entered the negotiations at a late date, who had no title to the eggs, who admittedly did not produce them nor intend to ship them, nor agree to pay the freight on them. We believe that when all the evidence is reviewed, this court will, as the Special Master and the trial court did, reject respondents' evidence that the oral contract was with Van Bokkelen. It will then find that the contract was actually made with libelants and was an oral contract. We will then show our right to recover damages for the breach of the agreed voyage.

The assignments of errors upon which this appeal is based are set out on pages 395 to 406 of the apostles herein. With the exception of slight differences in dates they are the same for both actions. In this appeal we are urging all of the assignments set out. In view of the fact that the same argument will support several of the assignments of errors, we will group the assignments of error in the Poultry Producers action and the corresponding assignments in the Washington Association action, which may be considered as bearing on one proposition.

The error of the District Court and the Master in finding that the bill of lading constituted the contract of carriage or that it was issued other than as a receipt for the goods is presented in the following specifications:

No. 2. The court erred in finding that the contract of carriage for the transportation of the shipment of eggs made on board the "Hindanger" by the libelant was evidenced by a written bill of lading issued to the libelant by respondent Westfal-Larsen & Co. and in finding that said bill of lading contained the terms of the contract for the transportation of the shipment of eggs in that said finding is contrary to the evidence; said finding of fact was duly excepted to by libelant.

No. 4. The court erred in failing to find that the bill of lading issued upon receipt of the eggs involved herein was issued by respondent Westfal-Larsen & Co. and received by libelant solely as a receipt and not as a contract of affreightment; the court's failure so to find was duly excepted to.

No. 7. The court erred in finding that the ports at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that there is no evidence to show that the bill of lading constituted the contract of carriage between the parties. Said finding was duly excepted to.

No. 9. The Special Master appointed by the court herein erred in finding that the rights of the parties herein must be determined by the bill of lading issued at the time of the receipt of the goods by respondents. Said finding was duly excepted to by libelant.

No. 10. The Special Master erred in failing to find that the bill of lading issued upon receipt of said goods by respondents from libelant was issued solely as a receipt and did not constitute a contract of affreightment between the parties; to which failure to find libelant duly excepted.

The error of the District Court and the Master in failing to find that there was an oral contract of affreightment between respondents and libelants is presented in the following specifications:

No. 3. The court erred in failing to find that the shipment of eggs herein sued upon was transported to Buenos Aires under an oral contract of affreightment between libelant and respondent Westfal-Larsen & Co.; the court's failure so to find was duly excepted to.

No. 5. The court erred in failing to find that on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Washington Cooperative Egg and Poultry Association, agreed to furnish, and respondents agreed to transport, not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco shipper's option upon the Motorship "Hindanger", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the

vessel as advertised from Seattle March 20, 1930, and from San Francisco April 2, 1930. The court's failure so to find was duly excepted to.

No. 6. The court erred in finding that for a period of some months prior to the aforesaid shipment, representatives of the libelant and respondents and or their respective agents conferred in preliminary negotiations regarding space, rates, sailing times, vessels, and other sundry matters concerning the general question of the shipment of eggs from the Pacific Coast of North America to the Atlantic Coast of South America, and particularly to Buenos Aires; that none of these preliminary negotiations resulted in the consummation of any contract between the libelant and respondents other than that evidenced by the bill of lading covering the transportation of the goods shipped, for the reason that the evidence shows that the preliminary negotiations were part of the oral contract of affreightment as finally consummated on March 10, 1930, and for the further reason that there is no evidence to support any finding that the contract between libelant and respondents was evidenced by the bill of lading covering the transportation of the goods shipped. Said finding was duly excepted to.

No. 11. The Special Master erred in failing to find that on or about March 10, 1930, the Pacific Egg Producers Cooperative, Inc., as agent for libelant and Washington Cooperative Egg and Poultry Association, agreed to furnish, and

respondents agreed to transport not less than ten thousand (10,000) nor more than fifteen thousand (15,000) cases of eggs from either Seattle or San Francisco, shipper's option, upon the Motorship "Hindanger", for shipment to Buenos Aires under refrigeration at an agreed freight of seventy cents (70¢) per case, the shipment to be made in approximately forty-eight days from Seattle, Washington, and thirty-five (35) days from San Francisco, California, the vessel to sail in accordance with the sailing schedule of the vessel as advertised from Seattle, March 20, 1930, and from San Francisco, April 2, 1930; to which failure to find libelant duly excepted.

Additional errors which the appeal specified are presented in the following formal specifications of the assignment of errors:

No. 1. The court erred in dismissing the libel and in failing to enter a decree in favor of libelant for damages arising from the breach by respondents of the contract of affreightment set forth in the libel.

No. 8. The court erred in finding that the ports at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that the bill of lading contained no provisions applicable to shipments between ports of the United States and foreign ports relating to the voyage to be pursued. Said finding was duly excepted to.

No. 12. That the Special Master erred in failing to find that thereafter and on or about the 18th day of March, 1930, respondents notified libelant that said vessel would be ready to load at San Francisco about April 4, 1930, and in failing to find that said subsequent notification definitely fixed the date upon which said M/S "Hindanger" agreed to be ready to load at San Francisco; to which failure to find libelant duly excepted.

No. 13. That the Special Master erred in failing to find that said M/S "Hindanger" was not ready to load at San Francisco on April 4, 1930, and in failing to find that said M/S "Hindanger" did not arrive in San Francisco until April 8, 1930, at 8 P. M. and was not ready to load until April 9, 1930; to which failure to find libelant duly excepted.

No. 14. That the Special Master erred in finding that said 11,000 cases of eggs were loaded on board said M/S "Hindanger" at San Francisco on or about April 7, 1930, and in failing to find that said 11,000 cases of eggs were loaded on board said vessel on April 9, 1930, and April 10, 1930; to which libelant duly excepted.

No. 16. That the Special Master erred in failing to find that the M/S "Hindanger" deviated from the agreed voyage in the same respects as respondents breached said oral contract as set out in paragraph 8 hereof; to which failure to find libelant duly excepted.

No. 17. That the Special Master erred in failing to find that respondents Westfal-Larsen & Co. and M/S "Hindanger" are liable to libelant for all damages caused libelant by reason of the aforesaid breaches of contract and deviations; to which failure to find libelant duly excepted.

No. 18. That the Special Master erred in holding that the libel should be dismissed and respondents awarded costs of action.

No. 19. That the Special Master erred in failing to award libelant its costs of action.

STATEMENT OF ARGUMENT.

Libelants will present to this court the statement of their position in the following points.

1. The conclusion of the Master that the rights of the parties are determined by the bill of lading and the finding of the court that the bill of lading evidenced the contract of the parties is not sustained by the evidence and results from a misapplication of the law to the evidence.

(a) If the negotiations testified to resulted in an oral contract between libelants and respondents, it was not superseded by the bills of lading.

(b) If the negotiations testified to resulted in an oral contract between respondents and Van Bokkelen, it was not superseded by the bills of lading.

(c) If the negotiations resulted in a situation in which libelants believed that the shipments moved under an oral contract between themselves and respondents, whereas respondents believed the shipments moved under an oral contract between themselves and Van Bokkelen, the bills of lading still do not determine the rights of the parties.

2. An oral contract existed between libelants and respondents and the finding of the Special Master and the court that there was no meeting of the minds of the parties in an oral contract resulted from a misapplication of the law to the facts.

3. The oral contract between libelants and respondents was breached by the voyage pursued.

4. The Special Master erred in failing to find that the M/S "Hindanger" deviated from the agreed voyage in the same respects as respondents breached said oral contract.

5. The Special Master erred in failing to find that said M/S "Hindanger" was not ready to load at San Francisco on April 4, 1930, and in failing to find that said M/S "Hindanger" did not arrive in San Francisco until April 8, 1930, at 8 P. M. and was not ready to load until April 9, 1930.

6. The Special Master erred in finding that said 11,000 cases of eggs were loaded on board said M/S "Hindanger" at San Francisco on or

about April 7, 1930, and in failing to find that said 11,000 cases of eggs were loaded on board said vessel on April 9, 1930, and April 10, 1930.

7. The court erred in finding that the ports at which the vessel stopped enroute to South America were such as could reasonably be contemplated within the liberties provided by the terms of the bill of lading for the reason that the bill of lading contained no provisions applicable to shipments between ports of the United States and foreign ports relating to the voyage to be pursued.

8. The libelants are entitled to a decree that they recover such damages as shall have been shown to have been sustained by them as a result of the breach of contract and deviation.

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1. **THE CONCLUSION OF THE MASTER THAT THE RIGHTS OF THE PARTIES ARE DETERMINED BY THE BILL OF LADING AND THE FINDING OF THE COURT THAT THE BILL OF LADING EVIDENCED THE CONTRACT OF THE PARTIES IS NOT SUSTAINED BY THE EVIDENCE AND RESULTS FROM A MISAPPLICATION OF THE LAW TO THE EVIDENCE.**

Under no theory of the evidence could the bill of lading evidence the contract or determine the rights of the parties. There are but three ways in which effect can be given to the testimony of libelants and respondents. If the libelants' testimony is believed, the shipments moved under an oral contract with respondents. If respondents' testimony is believed, the shipments moved under an oral contract with Van Bokkelen. If an attempt be made to reconcile the

testimony of the witnesses for libelants and respondents, this can only be done by finding that libelants believed that they contracted orally with respondents, whereas respondents believed that they contracted orally with Van Bokkelen, and that consequently there was no meeting of the minds of libelants and respondents, which would result in reaching the same conclusion as the Special Master when he held that there was no meeting of the minds upon an oral contract. We will consider each of these possibilities on the question of whether the bills of lading can constitute the contract of affreightment or determine the rights of the parties.

(a) If the negotiations testified to resulted in an oral contract between libelants and respondents, it was not superseded by the bills of lading.

Where a contract of affreightment is entered into by a carrier and a shipper, a subsequently issued bill of lading does not displace it in the absence of affirmative proof that the parties intended to contract on the terms set out in the bill of lading. Not only is such affirmative proof lacking in this case but, to the contrary, respondents' witness Mr. Wintemute testified that there were no negotiations between the parties subsequent to those which he claims resulted in an oral contract of affreightment (304). In *Northern Pacific R. Co. v. American Trading Co.*, 195 U. S. 439, 25 S. Ct. Rep. 84, a contract of affreightment had been completed by exchange of correspondence providing for shipment via the Northern Pacific Railroad Co. to Tacoma, Washington, thence via a certain steamer sailing on October 30th to Yokohama. The goods were

not forwarded on the steamer designated and the railroad company was sued for damages caused by failure to transport direct to Yokohama. The railroad company set up, among other defenses, that the bill of lading is the controlling contract and by its terms the receiver was not liable beyond its own line.

The bill of lading had been issued to libelant after the goods were loaded into cars and the particular clause relied upon was not called to the attention of the shipper's agent. As shown above, the railroad company relied upon the bill of lading exempting it from liability for failure of the vessel to transport the goods as this loss came within the bill of lading provision that the carrier would not be liable beyond its own line. The court held that the provisions of the bill of lading would not govern and held the carrier liable under the terms of the original contract of affreightment. The court stated:

> "We regarded as entirely clear that no such effacement of the original contract was meant by the receipt of the bill of lading. The railroad company had no power alone to alter that contract and it could not alter it by simply issuing a bill of lading, unless the other party assented to its conditions, and thereby made a new and different contract."

While this case involved a contract consummated by an exchange of correspondence, the Supreme Court cited with approval the case of *Bostwick v. B. & O. R. Co.*, 45 N. Y. 712, where it was held that under the circumstances of that case the acceptance of a bill of lading would not alter a previously made *oral* contract

in relation to the shipment. Obviously, then, the rule of this case applies to any prior contract of affreightment whether it be oral or written.

The case of *Northern Pacific R. Co. v. American Trading Co.,* supra, was made the basis for the decision in the *Mar Mediterraneo,* 1 F. (2d) 459, in which an action was brought upon an oral contract of affreightment. The carrier set up by way of defense certain clauses of the bill of lading issued subsequent to the making of the oral contract and at the time of delivery of the goods. The respondent excepted in that case to the libel upon the ground, among others, "That the libel does not show on its face either a compliance with the notice clause contained in the bill of lading or a waiver of compliance by claimant, and by reason of the premises the libel does not state a cause of action". In passing on this exception, the court stated:

> "With respect to the third exception, the libel recites an agreement of carriage, and thereafter the issuance of a bill of lading. The contract arose before the bill of lading issued, and the latter is therefore merely a receipt for the goods to be transported. Northern Pacific R. R. Co. v. American Trading Co., 195 U. S. 439, 465, 25 Sup. Ct. 84, 49 L. Ed. 269. The exception is overruled."

In the *Isle de Sumatra,* 286 Fed. 436, the goods were shipped pursuant to a contract of affreightment and a bill of lading was issued at the time of shipment. The vessel departed from the voyage agreed to in the original contract of affreightment but sought to excuse this departure under a clause in the bill of lading.

The court held the carrier to the original contract of affreightment holding that the prior agreement as to a direct voyage should be considered as a part of the whole contract including the bill of lading. In that case a deviation was found to exist though consisting of calling at a single extra port, the court emphasizing the fact that the early arrival of the vessel at destination was known by the parties.

In the *Julia Luckenbach,* 1923 A. M. C. 479, the oral contract of affreightment provided that the libelant would ship, on a specified steamer, a shipment of onions. This was a perishable product and it was agreed that it would be stowed between decks. It was further agreed that the vessel would proceed direct to the port of Philadelphia without stopping at any place except San Pedro. The vessel did not proceed direct to Philadelphia, sailing to New York first, and the cargo was not loaded between decks, and the respondent claimed "first, that there was no such oral agreement; second, that it was superseded, if there was one, by a certain letter; and, third, that the bill of lading does not contain these stipulations". The court held that the oral contract was proved, that it was not superseded by the letter which did not contain the full terms of the contract and that it was not superseded by the bill of lading. On the latter point the court said:

> "So far as the bill of lading is concerned, it is, of course, well established that a bill of lading supersedes all previous agreements and negotiations *if it becomes the contract.* In the answer, however, the respondent does not rely upon the

> bill of lading, but alleges, in so many words, that the only contract between the parties was this letter. In a case in this court by Judge De Haven, the Arctic Bird, 109 Fed. 167, Judge De Haven pointed out that the general rule in regard to bills of lading does not apply where the bill of lading is merely given as a receipt for the goods and was not intended to be the contract of the parties." (Italics ours.)

In the case of the *Arctic Bird,* supra, the court held that the contract of affreightment was not superseded by a bill of lading subsequently delivered, saying:

> "When claim is made that a contract under which goods were accepted by a carrier for transportation has been superseded by a bill of lading subsequently delivered, it is certainly reasonable to require proof in support of such claim, proof of the actual assent of the shipper to the terms contained in the bill of lading."

In the case of *Citta di Palermo,* 153 Fed. 378, the court had before it the question of a conflict between an oral contract of affreightment and a subsequently issued bill of lading. The case held that recovery could be had upon the oral contract of affreightment.

At the trial respondents urged strenuously that the issuance of the subsequent bill of lading, as a matter of law, barred the introduction of evidence of the oral contract which preceded it. (See 151 to 174.) The cases which it cited were all cases in which the court found that the bill of lading was accepted as the contract and under the parol evidence rule evidence of prior alleged arrangements as to certain phases of the agreement were excluded. Inasmuch as respondents

later conceded, on brief below, that a subsequent bill of lading does not supersede a prior oral contract, we will not consider those cases in detail in this brief. Under authorities which we have cited, if the oral contract with libelants was proved the holding that the bill of lading determined the rights of the parties or evidenced the contract is clearly erroneous.

(b) **If the negotiations testified to resulted in an oral contract between respondents and Van Bokkelen, it was not superseded by the bills of lading.**

The foregoing authorities demonstrate that as between the parties the issuance of a bill of lading does not supersede a prior oral contract. Respondents' defense to this action, at the trial, was upon the theory that the shipments moved under an oral contract with Van Bokkelen. Since respondents will not be permitted upon appeal to urge a different defense than that upon which they relied at the trial, we believe that the following citation from respondents' brief before the Special Master will dispense with a further review of respondents' testimony on this point. At page 10 of their brief before the Special Master respondents stated:

> "There was a definite agreement between Mr. Wintemute and Mr. Van Bokkelen on March 8th by which all of the elements of the contract for the carriage of these eggs were agreed upon. It is unnecessary for us to set forth in detail the testimony of the various parties which establishes that no contract was ever entered into between the libelants and respondents as claimed by the libelants, and that the only oral contract entered into was with Mr. Van Bokkelen. Libelants tes-

> tify that Mr. Van Bokkelen had no authority to enter into a contract with them. With this we are not concerned. Had the eggs not been shipped, the respondents in this case would have, we submit, a clear-cut case against Mr. Van Bokkelen for dead freight for a failure to have shipped the eggs. The amount, 15,000 cases, was agreed upon; the rate, 30 cents, was agreed upon; the ship, the "Hindanger", was agreed upon, and the expected time of sailing from the two ports was settled."

No intent to supersede an oral contract between respondents and Van Bokkelen could be inferred by the issuance of a bill of lading to libelants, not only for the reasons that support the rule as between parties to the contract, but also because it would mean that Van Bokkelen's contract, if one existed, would be made null and void by the actions of other parties and without his assent. (*Burns v. Burns*, 131 Fed. 238.)

We do not for one moment concede that the evidence in this case would justify a finding of an oral contract between respondents and Van Bokkelen pursuant to which all of Van Bokkelen's obligations were performed by libelants. We only state respondents' theory of the evidence to show the positive error in the finding that the bills of lading evidenced the contract or determined the rights of the parties.

(c) If the negotiations resulted in a situation in which libelants believed that the shipments moved under an oral contract between themselves and respondents, whereas respondents believed the shipments moved under an oral contract between themselves and Van Bokkelen, the bills of lading still do not determine the rights of the parties.

A consideration of this question involves an analysis of the basis upon which the bill of lading may determine the rights of the parties.

In *Thompson on Bills of Lading*, the opening paragraph is devoted to a consideration of the general principle of contracts which the author considers equally applicable to bills of lading. The author points out that no agreement which fails to satisfy any of these conditions, including the mutual assent of the parties and the intention to make the agreement, is legally enforceable. Where an oral contract is *actually* entered into between the parties, the bill of lading does not supersede that contract in the absence of proof of an intention that it should. We respectfully submit that these cases are not based upon any difficulty in reducing an oral contract to writing but upon the absence of an intention to contract upon the terms set out in the bill of lading under such circumstances. In other words, it is not the oral contract in itself which prevents the written bill of lading being deemed to express the agreement of the parties; the fact that an oral contract has been entered into is taken to be proof that the parties *did not intend* to contract on the terms set out in the bill of lading in the absence of specific proof to the contrary. Obviously the parties would no

more intend that the bill of lading should express the terms of their agreement when there was an *actual* meeting of the minds than *when each thought that the shipments were moving pursuant to an oral contract.*

Where there is an oral contract between the parties, the courts apparently find no *offer* to contract in the issuance of the bill of lading by the steamship company and no *acceptance* by the shipper upon its receipt of the bill of lading, because the law does not consider that under such circumstances the parties intended to offer or accept a contract. How, then, could it be said that the intent of the parties is any different if the minds of the parties did not actually meet upon an oral contract but each *believed* that the shipment was being made pursuant to an oral contract? This is particularly obvious in the present case where respondent claims that the shipments moved under an oral contract with Van Bokkelen. Certainly respondents would not intend to contract with libelants on the terms contained in the bills of lading if they believed the contract under which the shipments moved was with Van Bokkelen.

The obvious rule of contract law, that if neither party intended the making of a contract by what was done no contract would result, was recently stated by the Circuit Court of Appeals for the Sixth Circuit in *National Bank of Kentucky v. Louisville Trust Co.*, 67 F. (2d) 97. Contracts are not made by the court but by the parties. Where a bill of lading is issued under circumstances which indicate an intent that

the parties deemed it to state the agreement under which the goods were being shipped, it determines the rights of the parties. Where the circumstances are such that no intent to contract on the terms set forth in the bill of lading can be inferred, then the bill of lading is deemed merely a receipt or a document of title and not the contract. It is, of course, not necessary that any express contract, oral or written, be made for the transportation of goods by a common carrier. If no express contract is made the law raises by implication an implied contract to transport the goods on the intended voyage at a reasonable rate.

As we have shown, where a prior oral contract between the parties exists, there is no inference that the bill of lading constitutes the contract and affirmative proof of an intent to ship under the terms set forth in the bill of lading must be shown. No such intent was shown in this case. On the other hand, where there have been no prior negotiations or where the prior negotiations have related only to some particular phase of the transportation, the courts hold that the issuance of the bill of lading and its acceptance by the shipper raises the presumption that it is intended to be the contract. We are familiar with no case in which a bill of lading has been issued under such circumstances as result from the construction of the evidence which we are assuming here,—that is, where each party believed that it had an oral contract of affreightment under which the shipments were moving but where there was no actual meeting of the minds of the parties in such an oral contract. The

question is here presented whether under such circumstances an intent to contract can be found. We respectfully submit that the true rule underlying the decisions, holding that where an actual oral contract exists the bill of lading does not control, supports libelants' position that the bill of lading would not constitute the contract where both parties believed that the shipments moved under an oral contract of affreightment.

We have now considered the only possible constructions which can conceivably be placed upon the evidence in this case, and have shown that no theory of the evidence sustains the finding that the bill of lading evidenced the contract. When this error is corrected by this court it becomes necessary to determine upon all the evidence just what contract was made for the transportation of these eggs. The Special Master and the court both recognized, impliedly at least, that there was a contractual relationship between libelants and respondents. We will now show that this contract was the oral contract which libelants pleaded and proved.

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2. AN ORAL CONTRACT EXISTED BETWEEN LIBELANTS AND RESPONDENTS AND THE FINDING OF THE SPECIAL MASTER AND THE COURT THAT THERE WAS NO MEETING OF THE MINDS OF THE PARTIES IN AN ORAL CONTRACT RESULTED FROM A MISAPPLICATION OF THE LAW TO THE FACTS.

The factual situation disclosed by the testimony of witnesses for both libelants and respondents proves

conclusively that these shipments moved under an oral contract of affreightment. We have previously shown that the Special Master and the court failed to accord to respondents' concession that an oral contract was made in March, the weight to which it was entitled on the issue of whether the bill of lading constituted the contract of affreightment. We will now show that the testimony was likewise ignored in determining what constituted the contract under which the shipment moved. Since the finding of the court that the bill of lading evidenced the contract must be rejected, it becomes necessary to determine upon the evidence what did constitute that contract.

The evidence shows an oral contract of affreightment between libelants and respondents for the transportation of these eggs under refrigeration upon a voyage to commence not later than March 24th from Seattle and April 4th from San Francisco, to be of approximately 35 days' duration and to reach Buenos Aires by May 10th. Libelants' evidence thoroughly establishes every element of the contract claimed. The meeting of February 15, 1930, was testified to by the witnesses McKibben and Rother and, unless their testimony be wholly disregarded, it shows that at that time the respondents positively agreed that the vessel would take but 35 days and that respondents, having full knowledge of the seasonal nature of the market in Buenos Aires, represented that a shipment on the M/S "Hindanger" would reach that port by early May. Where a seasonal condition of the market is called to the attention of the vessel, and a contract made for delivery in that seasonal market, the time

of the represented voyage becomes of primary importance.

Walton N. Moore Drygoods Co. v. Panama Mail Steamship Co., 1925 A. M. C. 1261.
The Iossifoglu, 32 F. (2d) 928 at 933.

The positive testimony of Mr. McKibben and Mr. Rother as to the meeting of February 15th was scarcely contradicted by Mr. Wintemute, the only witness of respondents who testified as to this conversation, and in connection with his testimony it is to be borne in mind that he admitted that prior to hearing the testimony of libelants' witnesses he did not recall the conversation at all when placed upon the stand (321). Upon cross-examination Mr. Wintemute conceded that his recollection of that meeting was extremely vague and as to most of the testimony of libelants' witnesses was unable to either affirm or deny the truth of the statements (341-342-343).

We do not claim that at this February meeting a complete contract was entered into. As has been shown, the oral contract was finally consummated on March 10, 1930. However, at the prior negotiations certain vital parts of the ultimate contract were agreed upon and by those negotiations the intended voyage, with reference to which the contract was entered into, was determined. That the sailing schedule was discussed in these negotiations was found by the Special Master.

Prior negotiations of this sort form the basis of a contract made with reference to them. Libelants' witness Mr. Rother, sales manager of Poultry Pro-

ducers, stated that as a result of these negotiations he commenced to assemble the eggs (257). The facts of this case are squarely within those of *Armendaiz Brothers v. United States,* 1925 A. M. C. 560, in which representations by advertising and in response to personal inquiry as to the sailing date of the vessel were held to constitute part of a binding oral contract of affreightment and were a warranty that the vessel would sail on or about the advertised and represented date for breach of which the vessel was liable. The statement of fact in that case brings it so squarely in point in the instant proceeding that we will cite at some length from the decision:

> "This is a suit to recover $4,000. damages alleged to have been sustained by libellants as a result of the undue delay in the sailing of the steamship Ablanset from New York to Bilbao, Spain, which caused a partial loss of market for libellants' sugar.
>
> Armendaiz Brothers, Inc. in New York City, were negotiating with Trueba & Pardo in Bilbao, Spain, for the sale of several hundred tons of sugar. A representative of Armendaiz Brothers, Inc. investigating the sailings of vesels for Spain, found in the issue of September 25th, 1920, of the Journal of Commerce & Commercial Bulletin, a commercial paper published on that day in the City of New York, an advertisement of Norton, Lilly & Company, representing the steamship Ablanset as sailing on September 30th, 1920, for Bilbao, Spain. He then personally applied to Norton, Lilly & Company, the agent of the United States Shipping Board in the operation and management of the said Ablanset. In reply to his

inquiries, representatives of Norton, Lilly & Company informed him that the Ablanset could transport the cargo offered for shipment by Armendaiz Brothers, Inc. on the Ablanset and at the same time represented that that ship would sail not later than October 15th, 1920, and would sail directly from New York to Bilbao, Spain. Relying upon these representations, Armendaiz Brothers, Inc. on October 6th, 1920, completed the second of two contracts of sale for 200 tons of sugar to Trueba & Pardo in two lots of 1,004 bags each, and to be shipped immediately, c. i. f.

The representative of Armendaiz Brothers, Inc. then again personally went to Norton, Lilly & Company and informed that Company's representatives that it was necessary that these 200 tons of sugar be shipped immediately and be delivered without delay, as the market in sugar was declining. At that time the representation was again made by Norton, Lilly & Company that the ship would actually sail on or before October 15th and an oral contract of affreightment was there and then entered into between Armendaiz Brothers, Inc. and the United States Shipping Board through its agent, Norton, Lilly & Company, for the shipment of 200 tons of sugar from New York to Spain on the Ablanset, which was to sail on or about October 15th, 1920.

From September 25th, 1920, until November 20th, 1920, Norton, Lilly & Company advertised the sailing of the steamship Ablanset on various dates, the last sailing date being given as November 10th. This date of November 10th was given in the advertisement even as late as November 20th, after the steamer had sailed on November 13th.

A brief letter of confirmation of the engagement of freight space for 200 tons of sugar was written by Armendaiz Brothers, Inc. on October 6th, 1920.

A permit to deliver the shipment of sugar to the steamship pier was given to Armendaiz Brothers, Inc. by Norton, Lilly & Company, giving the period October 11th to the 13th, 1920, as the permitted time of delivery to the vessel. All of the 200 tons of sugar were delivered to the vessel on or before October 13th, 1920. At that time receipts were obtained for the sugar, which were exchanged for bills of lading dated October 13th, 1920. No date of sailing was mentioned in either of these."

With reference to the question of whether or not the oral contract of affreightment was binding, the court said, at page 563:

"The oral contract of affreightment was a binding agreement which included a representation as to sailing date. The Julia Luckenbach, 1923 A. M. C. 479. This representation amounted to a warranty that the vessel would sail on or about October 15th, 1920, or within a reasonable time thereafter, for the breach of which the vessel is liable. Williams Steamship Company v. McLeod Lumber Company, 1924 A. M. C. 663; Bolle Watson v. Royal Belge, 1924 A. M. C. 530.

The bill of lading which libellant got was more in the nature of a receipt rather than a complete contract of carriage as in the Julia Luckenbach, 1923 A. M. C. 479, and the G. R. Crowe, 1924 A. M. C. 5."

Upon the question of whether an oral contract was actually consummated between libelants and respondents by the negotiations in March, the Master's finding is that there was no meeting of the minds upon a contract. The implication of this finding is that the Special Master did not reject the testimony of libelants' witnesses but found that that testimony did not establish an oral contract. We have previously pointed out that the only issue of fact in this connection is whether the oral contract, admittedly made with someone, was made with libelants on March 10th or with Van Bokkelen on March 8th. Mr. Wintemute testified that in his opinion he made an oral contract on March 8th with Van Bokkelen with the understanding that libelants would confirm the fact that they would furnish the eggs to be shipped; that he subsequently discussed the matter with libelants and in an agreement with them modified, as to the number of eggs to be shipped, the arrangement made with Van Bokkelen. The testimony of the witness John Lawler was that he confirmed the arrangement made on March 8th with Van Bokkelen because Van Bokkelen had no title to the eggs and Mr. Wintemute wanted the confirmation to come from his office (268). This confirmation was not merely of the fact that the Association would supply the eggs (270). His testimony was positively that libelants would ship from 10,000 to 15,000 cases of eggs on the "Hindanger" and Mr. Wintemute accepted this confirmation of space.

Both the Special Master and the court below failed to correctly apply the law to the facts in failing to find that the above negotiations resulted in an oral

contract. Clearly there was a contract made and it was for the court to determine whether it was between respondents and libelants or respondents and Van Bokkelen. While it is true that the opinion of Wintemute that the contract was with Van Bokkelen cannot be accepted because of its inherent improbability, its effect as an admission of the existence of some oral contract cannot be ignored. It is the failure to accord the proper weight to the conceded fact that these eggs moved under an oral contract which resulted in the decision of the Special Master and of the court.

We have no doubt that this court will, as did the Special Master and the trial court, reject the theory of respondents that the oral contract was with Van Bokkelen. This defense was not conceived by respondents until following the filing of their verified answers in the two libels in both of which they denied the existence of any contract, oral or otherwise, for the transportation of the eggs other than that which is evidenced by the bill of lading under which the eggs were shipped (26) and further denied that "the issuance, execution or delivery of said bill of lading was in pursuance of the alleged, or any, oral contract referred to in the libel herein, or in pursuance of any contract, oral or otherwise, other than the contract evidenced by the terms of said bill of lading, * * *" (24). It is inconsistent with all the tangible evidence in the case, including the fact that libelants owned the eggs, shipped them, and paid the freight on them and accepted delivery of them at Buenos Aires. It is directly disproved by the letter of March 12, 1930

(respondents' Exhibit "A"), by respondent General Steamship Corporation on behalf of the other respondents in which libelants' selling agent was written as follows:

> "When Mr. Von Bokkelen was in our office at the end of last week, he requested us to reserve space on our MS. 'Hindanger' sailing from San Francisco early April, for a total of 15,000 cases eggs for Buenos Aires, to be loaded as follows:
>
> Seattle ..... 3,000 cases
> San Francisco ..... 12,000 "
>
> Rate of freight 70¢ per case.
>
> Kindly confirm the above booking immediately."

This letter is a direct admission by respondents, immediately after the conversations of Wintemute with Van Bokkelen and Lawler, that Van Bokkelen had merely *reserved* the space and that the *booking* was between libelants and respondents. Again the regular booking form of space subsequently sent out showed that respondents were seeking written confirmation of the oral contract with libelants. (Exhibit 3.) This confirmation failed to state correctly certain of the agreements of the parties and was never signed by libelants, but it stands as an admission by respondents that the oral contract, admittedly made with someone, was actually made with libelants. That respondents' conception of the negotiations with Van Bokkelen and Lawler was not deemed to be for a booking of space for Van Bokkelen's account at the time they were made is conclusively shown by the fact that in Exhibit 3 respondents state "we confirm engagement of space *for your account* on the following terms". Exhibit 3

was addressed to Pacific Egg Producers, Inc. and deals with these particular shipments.

Respondents on argument below relied very strongly on the fact that Mr. Lawler testified as follows, and inferred therefrom that his confirmation was not the consummation of a contract:

> "Q. Mr. Lawler, did you make the contract for the shipment of these eggs on that date?
>
> A. The contract with whom?
>
> Q. With Westfal, Larsen & Company through the General Steamship Corporation?
>
> A. The contract, or the arrangement was made with Walter Van Bokkelen and he telephoned that I had to confirm it with Mr. Wintemute.
>
> Q. Did you confirm it?
>
> A. Yes" (263).

In view of the fact that the Special Master obviously rejected the testimony of Mr. Wintemute that the contract was made with Van Bokkelen, it appears that his finding that there was no meeting of the minds is based upon an erroneous application of the law to this testimony. This testimony must be considered in the light of Mr. Lawler's testimony which immediately preceded this statement.

> "Q. What was stated in that conversation, Mr. Lawler?
>
> A. I confirmed the space on the 'Hindanger' which had been arranged for on the Saturday previous by Mr. Van Bokkelen.
>
> Q. What did you tell him?
>
> A. I told him that we would ship from ten to fifteen thousand cases of eggs on the 'Hindanger'.
>
> Q. Was the rate agreed upon?

A. The rate was agreed upon some time prior to that. I had no negotiations on the rate as far as I can remember.

Q. Had you been advised as to it?

A. Yes, I had; if I remember correctly I had a wire from New York that the rate had been agreed to.

Q. Were these eggs that were shipped shipped at that rate?

A. Yes.

Q. Did Mr. Wintemute accept the confirmation of the space?

A. Yes.

Q. At that time did you have in mind the statements that had been made in reference to the time of transit of this vessel?

A. In that respect I could give you the same information that has already been given to you by Mr. Rother.

Q. What did you have in mind?

A. About 35 days in transit. The boat had been somewhat delayed, if I remember correctly, it was somewhere around the first of April that would bring it in—at least the first part of May.

Q. Did the information that you had as to the sailing date and the time of the voyage have anything to do with your confirmation of this space?

A. The time element was one of the most important elements in this whole thing.

Q. Mr. Lawler, did you make the contract for the shipment of these eggs on that date? (262-263).

The question as to the effect of this conversation between Mr. Wintemute and Mr. Lawler is for the court

to determine. Had Mr. Lawler stated that in his opinion this conversation was the actual making of the contract, it would have added nothing of probative force to the testimony which he gave. That conversation, as a matter of law, was the making of a contract. Mr. Lawler confined himself strictly to relating facts and simply avoided expressing his conclusion as to when in a series of negotiations of this sort the contract would be made as a matter of law. There is no question from Mr. Lawler's testimony that he knew that the combination of negotiations testified to resulted in a contract *between libelants and respondents.* We believe that the Special Master's error in failing to find a meeting of the minds must have resulted from an erroneous conception of the weight to be accorded the opinion of the witness as to what constituted the contract. All the facts upon which the witness could base such an opinion were in evidence and those facts definitely prove the oral contract claimed by libelants.

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3. **THE ORAL CONTRACT BETWEEN LIBELANTS AND RESPONDENTS WAS BREACHED BY THE VOYAGE PURSUED.**

A contract of affreightment is a mercantile contract as to which time is of the essence. In *Gray v. Moore,* 37 Fed. 266, the court said:

> "When time, therefore, is specified, and both parties contract with regard to it, whether it be the time at which the vessel is to be ready to receive cargo, or the day of sailing, or of arrival

> outwards, or the day of another event in the voyage, the court holds that it is in the nature of a condition precedent to the rights of the owner under the rest of the charter party."

This general proposition of law is thoroughly established and is borne out by cases allowing recovery for failure to arrive or sail at the time agreed upon, whenever from the circumstances of the case the time is deemed to have been definitely fixed. We have already shown that in *The Ablanset,* supra, on facts substantially similar to the principal case the court held that the "oral contract of affreightment was a binding agreement which included a representation as to the sailing date", and the vessel was held liable for its breach. In *The Texandrier,* 1923 A. M. C. 722, the contract of affreightment specified that the vessel was due to arrive middle of May. In that case the vessel actually sailed the end of May and it was held to be a breach of contract. In *Bolle Watson v. Royal Belge,* 1924 A. M. C. 530, an action was maintained for the breach of an agreement as to the time of furnishing the vessel. It is admitted that when the arrangement was made with Van Bokkelen the sailing date of the vessel was represented as about March 24 from Seattle, and April 4th from San Francisco (298). Subsequently, on March 18th respondents notified libelants that the vessel would be ready to load about April 4th at San Francisco and March 24th at Seattle. (Exhibit 3.) Even if the first arrangement was not a binding warranty as to the sailing date, this subsequent notification became such a warranty and fixed the time at which respondents must be ready to

load under the rule of *Williams Steamship Co. v. McLeod Lumber Company,* 1924 A. M. C. 663. In that case the original contract provided for loading about June 5th. The court, while emphasizing the fact that time is of the essence of mercantile contracts and consequently of such a contract as this, held that the term "about June 5th" was apparently not intended to definitely fix the sailing date. Thereafter, however, the vessel orally notified the shipper that the vessel would be ready to sail about June 12th. The court held that the subsequent notification definitely fixed the date and that upon arrival of the vessel on June 18th the shipper was relieved of his obligation to accept the space. The delay of six days from the date of the second notification was held to have constituted a breach of the contract of affreightment. When the law of that case is applied to the facts here, libelants' right to recover is established. The vessel was not ready to load at Seattle until March 27th, and was not ready to load at San Francisco until April 9th. Libelants are entitled to their damages for this breach. This provision of the contract was not waived by the acceptance of delayed performance.

Boak v. United States Shipping Board E. F. Corp., 11 F. (2d) 523;

Cohn v. United States Shipping Board, 20 F. (2d) 56.

As to the agreement that the vessel would make the voyage in 35 days from San Francisco and arrive at Buenos Aires not later than May 10th, a breach of contract by respondents is conclusively proved by the

admitted fact that the voyage was of 49 days duration from San Francisco and that the vessel arrived in Buenos Aires on May 29th. The advertised schedule, with reference to which the contract was made, showed that no call would be made at either Pernambuco or Bahia and that the stay at Montevideo would be but one day. In each of these representations the contract was breached by the voluntary act of the respondents in booking cargo which required calls at both Pernambuco and Bahia and which required eight days to discharge at Montevideo instead of one as scheduled. Under the authority of the cases previously cited libelants are clearly entitled to recover their damages by reason of the delay caused by the respondents' act.

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4. **THE SPECIAL MASTER ERRED IN FAILING TO FIND THAT THE M S "HINDANGER" DEVIATED FROM THE AGREED VOYAGE IN THE SAME RESPECTS AS RESPONDENTS BREACHED SAID ORAL CONTRACT.**

If, upon a reconsideration of the record herein, this court finds that an oral contract of affreightment was entered into by libelants with respondents for the transportation of these goods upon the voyage agreed to at the conference of February 15, 1930, it is obvious that this oral contract was breached and that libelants are entitled to recover their damages. If this court should find, however, that there was no actual meeting of the minds of the parties hereto in an oral contract of affreightment and that the shipments moved upon an implied contract it then becomes the duty of this court to determine whether or not the respondents

deviated from the voyage which they impliedly contracted to make. Upon this question the Master made no finding of any kind as his only finding on the question of deviation was that the voyage pursued was within the voyage contemplated under the liberty of call clause of the bill of lading. Since we have heretofore shown that the bill of lading cannot govern the rights of the parties to this action, it necessarily follows that the voyage which the carrier was obligated to make must be determined as an original proposition by this court in order to determine whether a deviation therefrom occurred.

The modern conception of a deviation is set out in the case of *The Pinellas,* 1929 A. M. C. 1301, at page 1313, where the court said:

> "But the cargo owners also contend that the shipowner is liable for damages on the ground that there was a deviation, and that the shipowner thereby became the insurer of the cargo, or at least the burden was cast upon him of showing that the loss would have occurred if there had been no deviation, which has not been shown in this case.
>
> The term 'deviation' does not at the present day have the limited meaning that would ordinarily be suggested of a mere change in the route of a vessel, but it has a more varied meaning and wider significance. It was originally employed no doubt for the purpose its lexicographical definition implies, namely, to express the wandering or straying of a vessel from the customary course of the voyage; but it seems now to comprehend in general every conduct of a ship or other vessel used in commerce tending

> to vary or increase the risk incident to the shipment. It comprehends any voluntary act of the shipowner, or voluntary departure from the usual course, without necessity or any reasonable cause, which increases or changes the risk in the shipment; and when such deviation occurs, the shipowner becomes liable as an insurer or at least the burden is cast upon him to show that the loss would have occurred if there had been no deviation."

The distance of the deviation is of no importance and may result from a movement within the confines of a single port. (*Robin Hood,* 1932 A. M. C. 811.) Likewise a very slight delay in loading may constitute a deviation as in the case of *The Hermosa,* 1931 A. M. C. 1075, in which it was held that a delay of approximately twenty-seven hours in sailing caused by the intoxication of the Master was a deviation. Obviously no particular significance attaches to the fact that the intoxication of the Master was the cause of the delay upon the question of the delay in sailing constituting a deviation. If such a delay is a deviation, then any other unexcused delay in sailing constitutes a deviation, since a deviation is not founded upon negligence. Likewise, in the case of *The Sanguiseppe,* 1923 A. M. C. 608, a delay in sailing from the loading port was held to constitute a deviation.

Even if this court should find that there was no oral contract of affreightment fixing the precise voyage, the intended voyage must be implied from the representations, by advertising and otherwise, that the vessel would pursue the voyage which would take

approximately 35 days, that the vessel would stop only at the ports named in the advertisement and, allowing reasonable variation, for approximately the time represented by the advertisements. Nothing in the prior voyages of the vessels, or in the advertisements and representations concerning this or other voyages, indicated a call at Bahia in South America. The advertisment in the Guide, for example (84), shows the vessel as sailing via Panama Canal for Rio de Janeiro, Santos, Buenos Aires and Montevideo, Rosario and Santa Fe (if inducements offer). Thus the advertisement purports to show the extent of the calls with the right to eliminate some of them if inducements for the calls did not offer. It contains no indication that the vessel will proceed to Bahia or Pernambuco.

No vessel of respondents in this service had ever before called at Bahia, as shown by the voyages listed in the respondents' answer to libelants' interrogatories, and only one had ever stopped at Pernambuco. The stop at Bahia was for the purpose of discharging *gasoline*. It involved two days delay in the voyage. Certainly it is a substantial increase in the risk of the voyage to send a vessel into strange ports in South America to discharge an explosive such as gasoline. A deviation from the agreed voyage also occurred in the extended stay in Montevideo of eight days. While the represented time on the sailing schedule of one day may not have constituted an absolute limitation on its stay at that port, nevertheless in view of the testimony and of the known sailing speed of the vessel, it is obvious that the cargo booked for Monte-

video could not possibly be discharged in time to permit any such voyage as was represented.

The depositions of the Master and Chief Officer of the vessel show that substantially the entire delay was caused by the voluntary act of the respondents in booking cargo which would require that the voyage take approximately 14 days longer than the agreed time. Under those circumstances the respondents are clearly liable for the loss caused by the delay.

When it is borne in mind that the service of the respondents between Pacific ports and Buenos Aires through the Panama Canal had only commenced in October, 1929, and that but three voyages had been completed prior to the voyage here involved (38), the significance of the advertisements of respondents becomes obvious in determining the intended voyage. The importance of advertising in determining the intended voyage is well illustrated by the case of *General Hide & Skin Corporation v. United States,* 24 F. (2d) 736. That case concerned a shipment from Tientsin to New York under a broad liberty of call clause which is set out in the bill of lading. The court held that there were two routes from Tientsin to New York, one via Suez and one via Panama Canal, and that under the bill of lading, standing alone, the ship had the right to choose either route. The court held, however, that the vessel by advertising that it would proceed through the Panama Canal determined for the purposes of the contract the route which the vessel was to take. The court held:

> "The voyage on which it was contemplated to carry at the time of shipment can be shown by

> extrinsic evidence, and the carrier's advertisements may be shown to determine the voyage contemplated. Propeller Niagara v. Cordes, 21 How. 7, at page 24, 16 L. Ed. 41. * * * It clearly appears that the voyage advertised by the agent for the ship, and contemplated by shipper and the ship at the time the contract of affreightment was made, and on the commencement of the voyage, was via Panama."

The change in this voyage, as compared with the voyage represented by the respondents, was obviously for the purpose of saving the vessel from loss by reason of the fact that not sufficient cargo was offered the other ports for the agreed voyage. It was a change deliberately made by the vessel and, as is shown by the testimony of the Master of the "Hindanger" heretofore referred to, the entire cause of the delay was this scheduling of freight of such a character and to such ports as to make it impossible to complete the voyage in a shorter time. That this conduct of the respondents constitutes a deviation is clearly shown by the following language of the court in *General Hide & Skin Corporation v. United States,* supra.

> "The change in the course of the ship from the shorter Panama route to the longer Suez route constituted deviation, and was deliberately done to save the ship from loss by reason of the fact that not sufficient cargo was offered at other ports for the agreed voyage. By breaking its warranty not to deviate, the respondent, as owner of the ship, became the insurer of the cargo and liable for all damages occasioned to the consignee."

5. THE SPECIAL MASTER ERRED IN FAILING TO FIND THAT SAID M S "HINDANGER" WAS NOT READY TO LOAD AT SAN FRANCISCO ON APRIL 4, 1930, AND IN FAILING TO FIND THAT SAID M S "HINDANGER" DID NOT ARRIVE IN SAN FRANCISCO UNTIL APRIL 8, 1930, AT 8 P. M. AND WAS NOT READY TO LOAD UNTIL APRIL 9, 1930.

The arrival of the M/S "Hindanger" at San Francisco is stipulated to have been April 8th at 8 P. M. (78). The vessel commenced loading on the 9th (365). In connection with the corresponding exception to the failure of the Special Master to find that the M/S "Hindanger" was not ready to load at Seattle, Washington, until March 27, 1930, at 8 P. M., it was stipulated that the arrival date of the "Hindanger" in Seattle was March 27th (388).

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6. THE SPECIAL MASTER ERRED IN FINDING THAT SAID 11,000 CASES OF EGGS WERE LOADED ON BOARD SAID M/S "HINDANGER" AT SAN FRANCISCO ON OR ABOUT APRIL 7, 1930, AND IN FAILING TO FIND THAT SAID 11,000 CASES OF EGGS WERE LOADED ON BOARD SAID VESSEL ON APRIL 9, 1930, AND APRIL 10, 1930.

This fact is proved by the stipulation that Mr. McCurdy, if called as a witness on behalf of libelants, would testify that the eggs would not have arrived in San Francisco from Santa Rosa, the originating point, for loading on the "Hindanger" until the day after the date on which the shipments left Santa Rosa, California, and the shipments were all shown to have been made from Santa Rosa on either April 7th or April 8th (392). Consequently, the finding that the shipments were loaded on board the "Hindanger"

on April 7th is erroneous and in view of the fact that the bill of lading would not be issued until the eggs were received (366) the date shown upon the bill of lading does not represent the actual date upon which the bill of lading was issued. We mention this because of the possible bearing of the time of issuance of the bill of lading upon the question of whether or not an intent to contract upon the terms of the bill of lading might be inferred.

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7. **THE COURT ERRED IN FINDING THAT THE PORTS AT WHICH THE VESSEL STOPPED ENROUTE TO SOUTH AMERICA WERE SUCH AS COULD REASONABLY BE CONTEMPLATED WITHIN THE LIBERTIES PROVIDED BY THE TERMS OF THE BILL OF LADING FOR THE REASON THAT THE BILL OF LADING CONTAINED NO PROVISIONS APPLICABLE TO SHIPMENTS BETWEEN PORTS OF THE UNITED STATES AND FOREIGN PORTS RELATING TO THE VOYAGE TO BE PURSUED.**

Even should the finding that the bills of lading constituted the contracts of the parties and determined the rights of the parties be sustained in the face of the evidence that the shipment moved under an oral contract of affreightment, the holding of the Special Master that "the bills of lading involved in the instant matters endow the vessel with the liberty to call at ports in geographical rotation as did the Hindanger" was without support in the record for the reason that the bills of lading have no liberty of call clauses applicable to this voyage. The so-called liberty of call clause contained in the bill of lading reads as follows:

"2. The vessel to have liberty, either before or after proceeding towards the port of discharge; to proceed to the said port via any port or ports in any order or rotation outwards or forward, whether in or out of, or in a contrary direction to, or beyond the customary or advertised route; to pass the said port for which the cargo is destined and to return thereto; without same being deemed a deviation, whatever may be the reason for calling at or entering said port or ports, or for making such voyage or voyages, whether for the purpose of this, a prior, or subsequent voyage; to altogether depart from the customary route; to make or completely abandon the original voyage; to tranship or land and reship the goods at ports of shipment and transshipment, or at any other ports, or into any other steamer or steamers or sailing vessel for any purpose, and to forward to destination by another vessel; also to tow and assist vessels in all situations and to sail with or without pilots; all the said liberties, exceptions and conditions shall apply, although the vessel may be deviating from the voyage, and although such deviation may amount to a change or abandonment of the voyage; all such deviations are to be deemed within the contract voyage and notwithstanding unseaworthiness or unfitness of the ship at the commencement or during any period of the voyage."

Clause 23 of the bill of lading provides, in part,

"In all cases where merchandise or property is transported under this contract from or between ports of the United States and foreign ports within the meaning of said Act of 1893 * * * any provision of this bill of lading incon-

sistent with the said Act of Congress and revised statutes shall be treated as struck out and expunged."

It is libelants' position that the liberty of call clause in the bill of lading is clearly inconsistent with the Act of 1893, known as the Harter Act. Sections 1 and 2 of the Harter Act read as follows:

"1. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence properly equip, man, provisions, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow

her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

If, by the liberty of call clause, the obligation of the vessel to properly deliver the cargo is in any way lessened, weakened or avoided, the clause is inconsistent with the Harter Act and by the very terms of the bill of lading would be treated as struck out and expunged and consequently could not form a basis for the decision in this action. The clause not only weakens, lessens and avoids the obligation of the carrier to properly deliver the goods but wholly relieves the vessel of making any delivery under the intended voyage. By the express terms of the provision each and every privilege therein contained applies although such deviation may amount to a change or abandonment of the voyage, and furthermore all such deviations are deemed within the contract voyage notwithstanding unseaworthiness or unfitness of the ship at the commencement or during any part of the voyage. This clause is not only inconsistent with the Harter Act but directly violates both clauses 1 and 2 of that Act. The requirement in the Harter Act respecting proper delivery is that the delivery must be delivery at destination on completion of the contemplated voyage. No liberty of call clause which results in an abandonment of that voyage is permitted by the Act. Thus, for example, in *Calderon v. Atlas Steamship Company,* 64 Fed. 874, a provision of the bill of lading that

"in case any part of the goods can not be found for delivery during the steamer's stay at port of

> destination they are to be forwarded at the first opportunity, when found, at company's expense, the steamer not to be held liable for any claim for delay or otherwise."

was held to be superseded and overridden by the provisions of Section 1 of the Harter Act. The court said, at page 876:

> "It is plain that independently of the ninth clause endorsed on the bill of lading as above quoted, there was 'a failure in the proper delivery' of these goods. 'Proper delivery' includes a timely delivery. It does not permit goods to be carried voluntarily away from the port of destination upon another voyage. The defense must, therefore, rest on the stipulation in the bill of lading. But the Harter Act prohibits the insertion of any stipulation excusing a 'failure in proper delivery'. The words 'proper delivery' as used in the act can not mean any kind of a delivery that may be stipulated for, however unreasonable the stipulation may be; since that would thwart the very purpose of the first section of the statute, which was designed to protect shippers against the imposition of unreasonable stipulations in bills of lading to the prejudice of their interests."

This case was affirmed by the United States Supreme Court upon this point in *Calderon v. Atlas Steamship Company,* 170 U. S. 272, 18 S. Ct. Rep. 588.

In *Swift & Co. v. Furness, Withy & Co.,* 87 Fed. 345, an exception was inserted in the bill of lading as follows:

> "With liberty to sail with or without pilots, to make deviation, and to call at any intermediate

> port or ports for any purpose, and to tow and assist vessels in all situations. * * *"

Relying on the definition of deviation in the case of *Hostetter v. Park,* 137 U. S. 30, 11 S. Ct. 1, respondents claimed that the use of the word "deviation" in the bill of lading was an express stipulation permitting such deviations though they be unnecessary and unreasonable. In connection with this contention the court stated, at page 347:

> "If rules of construction forced us to adopt the view of the contract urged by the defendant, and to hold that it provided that the owner might delay the delivery of goods at his pleasure, this would not avail the defendant; for we should then be compelled to hold the provision void, under the act of February 13, 1893, c. 105 (27 Stat. 445)."

See also:

> *Yukon Milling & Grain Company v. Lone Star Steamship Co.,* 40 F. (2d) 752, 1930 A. M. C. 582.

It is true that the courts have held to be lawful liberty of call clauses which, if literally construed, would permit almost any deviation from the intended voyage. Such clauses have been sustained, however, only because it was possible by construction to limit their application so as to bring them within the spirit of the Harter Act. Thus in *Dietrich v. United States Shipping Board,* 9 F. (2d) 733, the court stated at page 742:

> "While the provision in question cannot be construed to be void, or as intended to confer

> upon the shipowner an absolute and unrestricted liberty to delay for any length of time, and for any reason, or no reason, the transportation of the goods, *still the intention of the parties must be so restricted and limited as to apply only to delays fairly ancillary to the prescribed voyage.* In effect, the promise of the shipowner was to carry the goods to their destination as soon as the reasonable arrangements of the carrier respecting the voyage would allow." (Italics ours.)

In that proceeding, as in others, the court sustained the liberty of call clause because it felt that it could be construed so as not to allow departures which would defeat the substantial purpose of the contract. In the *Frederick Luckenbach,* 15 F. (2d) 241, the court stated, at page 243:

> "The rule is one of interpretation, by which the meaning of words having a general significance is confined within the particular purpose of the agreement. But in ascertaining the true sense in which general words are used, the words themselves cannot be deprived of all meaning, for this would not be to interpret the agreement but to erase a part of it. Thus instances may be found where, because of the particularity with which the parties have provided that the ship may depart from the established and customary route, *such departures, not foreign to the general purpose of the voyage have been permitted."* (Italics ours.)

No construction can be placed upon the clause here in question which will limit its application to deviations within the scope of the intended voyage since it

in express terms applies to deviations which result in an abandonment of the voyage. The process of construction indulged in by the courts in cases of the nature of *Dietrich v. United States Shipping Board,* supra, unquestionably resulted from the application of the principle that where two constructions of a written contract are possible preference will be given to that which does not result in a violation of law. (*Great Northern Railway Co. v. Delmar Co.,* 283 U. S. 686, 51 S. Ct. Rep. 579.) In those cases the court was confronted with the alternative of decreeing the clauses unlawful by giving them a literal interpretation or of restricting their application by construction in order to make them lawful. Naturally, they were construed so as to make them lawful. Under this bill of lading, however, the question of unlawfulness of the clause does not arise. The bill of lading itself indicates that there are clauses contained therein which are inconsistent with the Harter Act and by its very terms provides for their expunction. Therefore, to give the words of the provision of these bills of lading their normal meaning, and in fact the only meaning which their language will sustain, results not in an unlawful contract but in their expunction by operation of the contract itself. Here the court is confronted not with the alternative of construing a clause so as to make it lawful or unlawful but of construing the bill of lading for or against the steamship company which drafted it. Under those circumstances, as held in *Gelderman v. Dollar Steamship Lines, Ltd.,* 41 F. (2d) 398,

> "the bill of lading, having been drawn by defendant, must be construed most strongly against it."

Obviously each and every provision of clause 2 of the bill of lading is tainted with the condition that it applies although it results in a complete abandonment of the voyage. Consequently, the entire provision must be treated as struck out and expunged and cannot form the basis for decision in this action.

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8. **THE LIBELANTS ARE ENTITLED TO A DECREE THAT THEY RECOVER SUCH DAMAGES AS SHALL HAVE BEEN SHOWN TO HAVE BEEN SUSTAINED BY THEM AS A RESULT OF THE BREACH OF CONTRACT AND DEVIATION.**

We respectfully submit that the decree of the court below dismissing the libels should be reversed and an interlocutory decree entered in favor of libelants, with costs, for the damages sustained by them by reason of the voyage pursued by the M/S "Hindanger". We are not unaware that where an issue of fact is tried by a Special Master upon reference by a court and thereafter a decree is entered in accordance with the findings of the Master by the trial court, this court will be reluctant to review the facts found. We have no hesitation, however, in seeking such review in this appeal for the reason that the decision of the Master unquestionably proceeds upon an erroneous conception of the law and an erroneous application of that law to the facts shown in the record.

Without the finding that the bill of lading determines the rights of the parties and that under the bill of lading the libelants are not entitled to recover, there

is no ground upon which the Master's report can be sustained. We have heretofore shown that the conclusion of the Master on this point is erroneous as a matter of law. The finding of the court that the bill of lading evidenced the contract is equally erroneous. We have endeavored to make it clear to the court that our position, that the bill of lading does not evidence the contract or determine the rights of the parties, is not based upon any conflict in the testimony but is predicated upon a proposition of law that regardless of whether libelants' testimony be believed or respondents' testimony be believed, or any part of the testimony of either libelants or respondents be believed, there is still no room, as a matter of law, for the finding that the bill of lading evidenced the contract or determined the rights of the parties.

The rule requiring great weight to be given to the decision of the Special Master is, of course, a sound one in cases in which it is applicable. It was recently considered in this circuit in the case of *Liisanantti v. Astoria North Beach Ferry Co.*, 64 F. (2d) 669, and this court recognized that the report of the Special Master in a reference such as this would be considered presumptively correct, but would be set aside or reversed on appeal for manifest errors in the consideration given to the evidence or in the application of the law. It is precisely such an error which has occurred in this case. See also:

Anderson v. Alaska Steamship Co., 22 F. (2d) 532.

It is true that the Special Master expressly found that there was no meeting of the minds of the parties hereto resulting in an oral contract. We respectfully submit, however, that the presumption in favor of this finding is greatly weakened by the recognition of the Master that a contractual relationship did exist between the parties which required that the bill of lading determined the rights. The Special Master obviously failed to accord sufficient weight to the fact admitted by both parties that an oral contract in fact existed with someone. The improbability of respondents' theory that the oral contract was between respondents and Van Bokkelen is recognized by the Master's failure to even consider the question of whether it existed. Instead of determining the issue raised by the evidence in the case of whether the oral contract admittedly made was made by respondents with Van Bokkelen or with libelants, the Special Master apparently considered the issue to be whether the contractual relationship between libelants and respondents, which he impliedly found, was evidenced by the bill of lading or by the oral contract claimed by libelants. Since we have shown that this resulted from an erroneous application of the law on the question of when a bill of lading is the contract, we have demonstrated that the presumption favoring his finding disappears. In determining, as we believe this court must, what contract between the parties regulates their rights, we respectfully submit that a review of the evidence shows that the shipment moved under the oral contract as claimed by libelants and that libelants

should recover. The decree should be reversed, and libelants are entitled to the interlocutory decree sought with costs.

Dated, San Francisco,
February 9, 1934.

Respectfully submitted.
CARL R. SCHULZ,
MILTON D. SAPIRO,
Attorneys for Appellants.

No. 7275

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POULTRY PRODUCERS OF CENTRAL CALIFORNIA (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees,

and

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

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BRIEF FOR APPELLEES.

OPENING STATEMENT.

This is an appeal from decrees dismissing libels in each of the above cases for alleged damage claimed to have been caused by delay and deviation.

The proceedings were consolidated for trial, and the consolidated actions, were, on stipulation of the parties and order of the trial court, referred to the United States Commissioner for "hearing, determination, and report." Exceptions to the answer of respondents on the issue of the alleged deviation were filed by libelants, argued by the respective counsel, and overruled by the trial court. The Commissioner, in a written opinion, made his report to the trial court, which, after setting forth the facts as found by him and the applicable law, reported that the libels should be dismissed. Exceptions were filed by appellants (libelants below) to all features of the Commissioner's report. The exceptions were overruled by the trial court. Findings of fact and conclusions of law were presented by respondents. Counter findings of fact and conclusions of law were presented by appellants, libelants below. The trial court, after due consideration, signed findings of fact and conclusions of law and ordered that judgment be entered in accordance with the Commissioner's report. The court overruled libelants' proposed exceptions and additions to findings of fact and conclusions of law and entered final decree dismissing the libels, from which final decrees appellants herein, libelants below, appeal.

All of the issues of fact and questions of law presented in these cases have been briefed and argued before the trial court and the Commissioner. There are no new issues of fact or questions of law raised by this appeal.

The issue of deviation was argued and briefed before the trial court on exceptions to the answer; be-

fore the Commissioner, following the conclusion of the hearing and upon submission of the cause; and before the trial court on exceptions to the report of the Commissioner. The facts and law on all other issues were argued and briefed before the Commissioner upon submission of the cases; and, before the trial court upon exceptions to the Commissioner's report. Thus, two distinct tribunals have had presented to them all of the facts and all of the law, and both tribunals have found no liability on behalf of appellees, respondents below, and that the libels should be dismissed. *All of the testimony in respect to the alleged contracts and shipments of the eggs, the subject matter of the litigation, was heard orally by the Commissioner in open court.* Libelants appeal on the grounds specified in assignments of errors covering exactly the same points raised by libelants in the trial court on exceptions to the Commissioner's report. The issues presented below and before this court on appeal are; first, whether the shipments were made under oral contracts of affreightment or in pursuance of written bills of lading; (The Commissioner and the trial court found that there was no oral contract between the parties hereto (Tr. 87, 100, 105) and that the rights of the parties must be determined by the bills of lading (Tr. 88, 100, 105) and, second, whether there was a breach of the contract between the parties. (The Commissioner and the trial court found that there was no breach of the contract between the parties, and no deviation (Tr. 88, 101, 105) and ordered the libels dismissed (Tr. 89).

ARGUMENT.

I. The report of the Commissioner, approved by the trial court, is presumptively correct and will not be disturbed on appeal except for manifest error.

II. The Circuit Court of Appeals will not disturb the findings of the trial court where based on conflicting testimony taken in open court except for manifest error.

III. The finding that there was no oral contract between these parties is fully supported by the evidence and should not be set aside.

IV. The finding that the rights of the parties hereto must be determined by the bills of lading is fully supported by the evidence and is in conformity with the law on the case.

V. There was no unpermitted deviation on the voyage of the "Hindanger" as contemplated by the contract between the parties and in accordance with the decisions on the subject.

VI. The decree of the trial court should be affirmed and the libels dismissed.

I.

THE REPORT OF THE COMMISSIONER, APPROVED BY THE TRIAL COURT, IS PRESUMPTIVELY CORRECT AND WILL NOT BE DISTURBED ON APPEAL EXCEPT FOR MANIFEST ERROR.

The reference to the Commissioner herein was by consent of the parties and order of court and required the Commissioner to "hear, determine and

report'' the matter. Appellants recognize (Brief, 57) the well-established principle that the findings of the special master will not be disturbed except for manifest error. This sound rule of law is so well established in this Circuit as to need little comment. In the case of *The Tourist,* 64 Fed. (2d) 669 (C. C. A. 9th), this court, in an admiralty case, affirmed the decree of dismissal of the District Court which had approved the findings of a Commissioner before whom the case was tried on a stipulation of the parties and order of the court. The trial court adopted the report of the Commissioner as its findings of fact and dismissed the libel. This court, in affirming the decree of dismissal, held (p. 670):

> ''As said by the court in William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co. (D. C.) 5 F. (2d) 731, 741, 'A preliminary question arises as to the weight which is to be given to the master's report.' If we treat the reference here as a consent reference, then the weight which is to be given to the commissioner's report and findings, which were adopted by the court as its findings, is governed by Davis v. Schwartz, 155 U. S. 631, 15 S. Ct. 237, 239, 39 L. Ed. 289, and Kimberly v. Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. Ed. 764. In the former case the court said:
>
> 'As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case

tried by the court under Revised Statutes, Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but *so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.* Wiscart v. Dauchy, 3 Dall. 321 (1 L. Ed. 619); Bond v. Brown, 12 How. 254 (13 L. Ed. 977); Graham v. Bayne, 18 How. 60, 62 (15 L. Ed. 265); Norris v. Jackson, 9 Wall. 125 (19 L. Ed. 608); Insurance Co. v. Folsom, 18 Wall. 237, 249 (21 L. Ed. 827); The Abbotsford, 98 U. S. 440 (25 L. Ed. 168).

The question of the conclusiveness of findings by a master in chancery under a similar order was directly passed upon in Kimberly v. Arms, 129 U. S. 512, 9 S. Ct. 355 (32 L. Ed. 764), in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet, where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the findings of a subordinate court. "Its findings,"

said the court, "like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed, under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise." As the reference in this case was by consent to find the facts, we think the rule in Kimberly v. Arms applies, and, as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive.'

* * * * * * *

'In cases such as this the rule is well settled that the findings of a special master, approved by the trial court, will not be set aside or reversed on appeal except for manifest error in the consideration given to the evidence, or in the application of the law.' The Chiquita (C. C. A. 9) 44 F. (2d) 302, 303. That there was no such error here is clear. The findings are supported by the evidence, and the conclusions of law are likewise supported by the findings. This conclusion we have reached after a consideration of the entire case."

See also *The Chiquita,* 44 Fed. (2d) 302 (C. C. A. 9th, 1930); *Anderson v. Alaska S. S. Co.,* 22 Fed. (2d) 532 (C. C. A. 9th, 1927). In the latter case, the court, speaking through Judge Rudkin, held (p. 535):

"An examination of the record leads us to the same conclusion ('A more extreme case of conflicting testimony it would be difficult to imagine.'); but, if we were in doubt, we are confronted with the findings of the commissioner,

approved by the court, and in such cases the rule is firmly established that the findings will not be disturbed, except for obvious error in the application of the law, or for a serious or important mistake in the consideration of the evidence."

See also:

Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764;

Davis v. Schwartz, 155 U. S. 631, 39 L. ed. 289;

Connor v. United States (C. C. A. 9th), 214 Fed. 522;

Ross, Inc. v. Public Service Corporation of N. J., 42 Fed. (2d) 79.

The evidence amply supports the findings of the Commissioner and the trial court. There is no competent evidence contrary to the report of the Commissioner, which supports the assignments of error and there is no manifest error upon which this court could base a finding setting aside the Commissioner's report and reversing the decree of the trial court.

II.

THE CIRCUIT COURT OF APPEALS WILL NOT DISTURB THE FINDINGS OF THE TRIAL COURT WHERE BASED ON CONFLICTING TESTIMONY TAKEN IN OPEN COURT EXCEPT FOR MANIFEST ERROR.

Another sound principle of law well-recognized by this court is that the Circuit Court of Appeals will not disturb the findings of the trial court where based upon conflicting testimony taken in open court. This

principle is in addition to the one previously stated that the report of the Commissioner will not be disturbed except for manifest error. In the instant case, all of the testimony having to do with the contractual relations of the parties to this litigation and the carriage of the cargo in question, was taken in open court before the Commissioner, who had an opportunity to judge for himself of the credibility of the witnesses and arrive at sound conclusions on the basis of what he had seen and heard.

In the case of *Gray & Barash, Inc., v. Luckenbach S. S. Co., et al.,* 8 Fed. (2d) 729 (C. C. A. 9th, 1925), this court, in an admiralty case, wherein the trial court dismissed the libel, held:

> "These findings are supported by competent testimony, and the rule is universal that findings of the trial court, based on conflicting testimony taken in open court, will not be disturbed on appeal, except for plain and manifest error."

The rule is well settled in this circuit by repeated decisions of this court:

Willfaro-Willsolo, 1926 A. M. C. 32 (1925);
The Mazatlan, 287 Fed. 873 (1923);
The Beaver, 253 Fed. 312 (1918);
The Hardy, 229 Fed. 985 (1916);
The Dolbadarn Castle, 222 Fed. 838 (1915);
The Bailey Gatzert, 179 Fed. 44 (1910).

The finding of the lower court that no oral contract existed between these parties and that the rights of the parties must be determined by the bills of lading and that there was no deviation in respect to the

cargo carried under these bills of lading should not be set aside.

III.

THE FINDING THAT THERE WAS NO ORAL CONTRACT BETWEEN THESE PARTIES IS FULLY SUPPORTED BY THE EVIDENCE AND SHOULD NOT BE SET ASIDE.

In their pleadings, appellants-libelants allege, and appellees-respondents deny, the existence of an oral contract between these parties. Appellees-respondents allege that the only contract between them for the carriage of the goods was evidenced by the bills of lading set forth in the record (Tr. 42, 43, 62, 63). Appellants-libelants sought to prove by extraneous evidence before the Commissioner the existence of an oral contract between the parties. The Commissioner found "no oral contracts were consummated between the parties" (Tr. 89). This finding was excepted to by appellants-libelants but sustained by the trial court. *No one of the witnesses for appellants-libelants claimed to have made any oral contract.* B. F. McKibben, Secretary of Pacific States Butter, Egg, Cheese and Poultry Association, told of a meeting with Mr. Wintemute, acting on behalf of respondents, February 15, 1930, and testified in answer to the first question of cross-examination (Tr. 226):

> "Mr. Graham. Q. You do not make any contention, do you, Mr. McKibben, that any agreements were reached at that meeting at all? You merely had general discussion in which each of

you expressed yourself as having in mind what you all wanted to do to develop this new business and how to ship them, or some ship to carry them?

A. *There was no definite agreement at that time. The question of rates was left to be determined later.*

Q. *All other questions having to do with the shipment were also left in abeyance?*

A. *Yes.*"

There is no contention any agreement was entered into prior to February 15th.

J. E. Rother, Sales Manager of Poultry Producers of Central California, one of the libelants, likewise testified emphatically on direct examination that no conclusions were arrived at during the meeting of February 15, and as follows (p. 237):

"Q. *Was there a rate fixed at that time?*

A. *To the best of my recollection the rate was not definitely settled.* We asked for a rate, and I am not sure about what rate we asked for at that time, but to the best of my recollection it was 30 cents a cubic foot.

Q. When the conference broke up was there any understanding that you would have further negotiations about the rate?

A. Yes, there was. *My recollection is that the conference did not settle anything more than that we were to carry on negotiations.* We saw that this steamer we had in mind, the 'Hindanger' would sail at the end of March and we were to continue negotiations about making the shipment. There were no definite terms that we would ship at."

Mr. Rother further testified that, representing the libelants in this case, he had very little part in the discussion and that the principal negotiations and conversations were carried on by Mr. Benjamin (Tr. 240). Mr. Benjamin (Tr. 239, 241) is the General Manager of Pacific Egg Producers, which Company handles the export business for the libelants (Tr. 239). Mr. Benjamin was not produced as a witness, nor was his testimony taken by deposition.

Under cross-examination, Mr. Rother definitely stated that he made no contract for the libelants (Tr. 241, 243):

> "Mr. Graham. Q. Did you, representing the Poultry Producers Association at any time thereafter, make any contract with the parties respondent in this action as to the carriage of these eggs on the 'Hindanger',—just limiting it to yourself representing the Poultry Producers Association?
>
> A. Did I make any contract? Is that the question?
>
> Q. Yes.
>
> * * * * * * *
>
> A. As I said, I did not carry these negotiations on.
>
> Mr. Graham. Q. In other words, you did not enter into any contract for the Association yourself?
>
> A. I was there and was interested because my duties made it necessary, but I know what was going on and because part of my work was to assemble the eggs for shipment and the shipping date was very important, but *the actual negotiations at that meeting were mostly con-*

ducted by Mr. Benjamin with Mr. Wintemute.

Mr. Graham. Of which you have no particular knowledge, so I move to strike out the answer of the witness as not responsive.

The Commissioner. Q. *Did you yourself have any kind of an agreement with the respondent, you personally?.*

A. *I did not.*

Mr. Graham. Representing his association?

The Commissioner. Representing his association, of course.

Mr. Graham. You did not?

A. I did not.

Q. *Just a minute, you at that time, neither entered into a contract nor did you at any other time enter into a contract for shipment of eggs, you representing yourself and your association?*

A. *I could not say that I did.*

The Commissioner. Your answer would be no?

A. I know this, we shipped the eggs.

* * * * * * *

Q. When was the contract that you testified to have been entered into, made with the respondents, on what date?

A. I could not answer that question because *Mr. Benjamin carried on these negotiations and I am not certain when they were completed.*

Q. *So that as far as you are concerned, you, acting for the Poultry Producers Association, did not make any contract? I think you said that was a fact?*

A. *I did not make any contract.*"

John Lawler, General Manager of Poultry Producers of Central California, and Secretary of Pacific Egg Producers Cooperative, testified that he was

not in direct contact with the preliminary negotiations during the period testified to by Mr. Rother, but that he received reports from Mr. Rother and Mr. Benjamin. On direct examination by his counsel, after having testified that he told Mr. Wintemute on March 10th over the telephone, "that he would ship from 10,000 to 15,000 cases of eggs on the "Hindanger" (Tr. 261, 262), testified as follows (Tr. 262):

> "Q. What was stated in that conversation, Mr. Lawler?
>
> A. I confirmed the space on the 'Hindanger' which had been arranged for on the Saturday previous by Mr. Van Bokkelen.
>
> Q. What did you tell him?
>
> A. I told him that we would ship from ten to fifteen thousand cases of eggs on the 'Hindanger'.
>
> Q. Was the rate agreed upon?
>
> A. The rate was agreed upon some time prior to that. *I had no negotiations on the rate as far as I can remember.*"

And, further (Tr. 263):

> "Q. Mr. Lawler, did you make the contract for the shipment of these eggs on that date?
>
> A. The contract with whom?
>
> Q. With Westfal, Larsen & Company through the General Steamship Corporation?
>
> A. The contract, or the arrangement was made with Walter Van Bokkelen and he telephoned that I had to confirm it with Mr. Wintemute."

The foregoing covers the testimony of all of the witnesses for appellants who testified in respect to

the alleged contract. *Not one of them contended he made any oral contract with these appellees,* and in fact each one denied it. The testimony is positive that at no time prior to the time of shipment and the issuance of the bills of lading was there any agreement, oral or otherwise, between these parties in connection with the shipment of eggs which thereafter moved on the "Hindanger". No authority need be cited to this court to establish the elements of a contract, whether written or oral, and this court need hardly be reminded that the rate to be charged by the steamship company for carrying cargo is of the greatest importance and an essential element to any such contract.

The testimony of Messrs. Wintemute and Reali, witnesses for appellees (Tr. 281 ff. 378 ff.) establishes that at no time prior to the shipment and issuance of the bills of lading was there any contract between these parties.

The witnesses for appellees deny having made any oral contract with appellants.

(Wintemute, Tr. 187):

> "A. I did not begin negotiations with them. I began negotiations with Mr. Walter Van Bokkelen about the first of March.
>
> Q. That was the only negotiations you had in reference to these shipments?
>
> A. Yes.
>
> Q. Had you had any prior ones wherein you met Mr. Benjamin and Mr. Rother?
>
> A. Not in connection with the 'Hindanger' shipment."

(Wintemute, Tr. 200):

"Mr. Graham. Q. Mr. Wintemute, did any of these conversations which you had with Mr. Benjamin result in the booking of any cargo by you for Pacific Egg Producers for shipment on your vessel at that time, and particularly the 'Hindanger'?

A. No."

(Wintemute, Tr. 283, 284):

"Q. You heard the testimony given that there was a meeting in your office on the 15th of February?

A. Yes.

Q. You were present at that meeting?

A. Yes.

Q. Do you remember who else was present from the General Steamship Corporation or Westfal, Larsen Company?

A. I believe that Captain Petersen, to the best of my recollection was there, representing Westfal, Larsen Company line.

Q. Had you had any previous meetings with the libelants or their representatives?

A. Yes I had.

Q. About when were those previous meetings?

A. In checking over my records, and my memory, I had meetings right along at various times, but the first meeting, to my knowledge, was the latter part of January or early in February.

Q. With whom were those meetings?

A. Mr. Benjamin, a representative of the egg concerns.

Q. As a result of those meetings was any cargo booked for shipment on any of your vessels?

Mr. Sapiro. We will object to that as leading and calling for the conclusion of the witness as to

what was a result of the meetings. The only thing he can say is, what happened.

Mr. Graham. All right, I will withdraw the question.

Q. What happened as a result of those meetings?

A. Nothing happened."

(Wintemute, Tr. 286):

"Mr. Graham. This conversation that you had in your office in February, 1930, with the representatives of the libelants was about what ship, Mr. Wintemute?

A. About the motorship 'Villanger'.

Q. Did you have a general discussion at that time?

A. We had general discussion at that time, having to do with the motorship 'Villanger' in particular.

Q. At that meeting on the 15th of February did you reach any conclusion, Mr. Wintemute, any contract for the shipment of eggs on the 'Villanger'?

A. No, there was no contract made.

Q. Were there any eggs shipped thereafter on the 'Villanger' by these libelants or either of them?

A. No."

(Wintemute, Tr. 289-290):

"Mr. Graham. Q. Will you state what was said at that meeting with respect to the shipment of eggs on the vessel on which it was to go?

A. The discussion, as I remember it, not only from my records, but from my memory, centered primarily on the possibility of the Pacific Egg Producers making a shipment of eggs to the

Argentine on the motorship 'Villanger', and the whole negotiations centered upon the question of rates.

Q. At that time was the 'Villanger' in a position to be able to load eggs had you been able to conclude negotiations?

A. She was."

(Wintemute, Tr. 294-298):

"Q. Now going back to the meeting of February 15, after that meeting broke up, did you have any further meetings from then on until the time of the shipment of these goods on the 'Hindanger', with the libelants or their representatives?

A. I can't say that we had any further meetings specially in connection with the 'Hindanger' because the 'Hindanger' was not the point of the meeting at the time.

Q. You testified that your meeting on the 15th of February related to the 'Villanger'. Did you close any shipments for the libelants on the 'Villanger' at all?

A. No.

Q. As time developed did the position of the 'Hindanger' and 'Villanger' as far as time of departure and time of arrival at the other end, remain the same?

A. No, they changed from time to time.

Q. What was the nature of the change of those positions?

A. They became delayed in their position.

Q. Do you know whether any options were given to these libelants for shipment of eggs on the 'Villanger' or 'Hindanger'?

A. We offered the space for a minimum of 12,000 cases on the motorship 'Villanger' in Los Angeles, with the McCormick Steamship Com-

pany, who gave them an option of 6000 cases in their steamer 'West Iris' which was the basis of our agreeing to meet their requisition for 40 cents a cubic foot rate.

Q. Were any shipments made on that 40-cent rate on the 'Villanger'?

A. Swift & Company, as I previously stated.

Q. Were any shipments made by these libelants on the 'Villanger'?

A. None.

Q. Following the reduction of the rate to 40 cents for the 'Villanger' was there a subsequent reduction of rates on the 'Villanger'?

A. Yes.

Q. When was that reduction in rates made, if you know?

A. May I make a correction to that last answer? I do not think I got your question right. May I change that now?

Q. What is the fact?

A. I am trying to recall from memory the best I can.

Q. What is the fact?

A. No.

Q. That is, these libelants were not offered any rate reduced from 40 cents for shipment on the 'Villanger'?

A. As far as I can remember, no.

Q. At the time that you were working with these libelants for shipment of eggs on the 'Villanger', were you working with anybody else for a shipment of eggs on the 'Villanger'?

Mr. Sapiro. I do not believe that would be material. If it has any relevancy I would not object to it.

Mr. Graham. I will withdraw it. Q. Now coming to the 'Hindanger' do you recall what your

first conversation was with these libelants or their representatives in connection with the shipment of eggs on the 'Hindanger'?

A. I believe my first conference with the egg producers in connection with the shipment on the 'Hindanger' was the conversation had with Mr. Lawler, confirming that he would supply the eggs for which space had been reserved by Mr. Van Bokkelen.

* * * * * * *

Q. Will you read that cable to yourself, refresh your recollection and tell me what happened on March 8th in connection with the shipment of eggs on the 'Hindanger'?

A. On the morning of March 8th Mr. Walter Van Bokkelen arrived in San Francisco and called on me, stating that he had just come from the East by plane. I had been in telegraphic communication with him and wondered how he got here so soon. He told me that he was now prepared to ship 15,000 cases of eggs on the motorship 'Hindanger', that he wanted to give us these eggs to carry out a promise made Mr. Von Erpecom, managing director of Messrs. Westfal, Larsen & Company, made to Mr. Von Erpecom in London, at which time Mr. Van Bokkelen had discussed with Mr. Von Erpecom the possibility of Westfal, Larsen Company allocating to Mr. Van Bokkelen for operation in the Blavin line operated by Mr. Van Bokkelen between New York and Buenos Aires, the last two of the new ships then being built by Westfal, Larsen Company for the trade between the Pacific Coast and Argentine and Brazil. Mr. Van Bokkelen said he wanted to carry out his promise to Mr. Von Erpecom to give us a shipment of eggs, and accordingly he said he would ship

15,000 cases, that he was arranging with the egg people, the Pacific Egg Producers, to ship the eggs.

Q. At that time, Mr. Wintemute, did you close a contract with Mr. Van Bokkelen or not?

A. Verbally, yes.

Q. Did you agree on the rate?

A. Yes."

(Wintemute, Tr. p. 313):

"Q. Did you ever have any discussion with Mr. Benjamin as to his shipping ten to fifteen thousand cases of eggs?

A. No, sir.

Q. What was your discussion with him at that time?

A. My discussion with Mr. Benjamin at that time was in connection with the possibility of shipping eggs to Buenos Aires via the Motorship 'Villanger'. The principal item at stake was the question of freight rates.

Q. And what freight rate did Mr. Benjamin want?

A. The first meeting I had with Mr. Benjamin we talked on a rate of $1.20 per case. Mr. Benjamin after that left for Seattle and when he came back he informed us that the New York Line had reduced their rate and he thought we ought to reduce our rate to a basis of 40 cents per cubic foot, which was the equivalent of approximately 93 cents per case.

Q. Did you ever discuss with Mr. Benjamin a 30-cent rate on eggs?

A. No, sir.

Q. When was the question of the 30-cent rate on eggs first mentioned?

A. That was first mentioned by Mr. Van Bokkelen in a telegram he sent us from Kansas City on March 3rd."

This contract with Van Bokkelen was distinct from and had nothing to do with the contract between these parties. Mr. Van Bokkelen had no authority to contract for appellants (Lawler, Tr. 273).

"The Commissioner. What is Mr. Van Bokkelen's position?

A. Mr. Van Bokkelen's firm was to sell eggs in the Argentine.

Q. He is not a member of the Poultry Producers of Central California?

A. No.

Mr. Sapiro. Q. Did he have any authority to make a contract with you?

A. No."

There is no proof of an oral contract between these parties, and all witnesses, appellants' and appellee's, deny having made one. It must have been conceived by counsel, although unsupported by the facts.

IV.

THE FINDING THAT THE RIGHTS OF THE PARTIES HERETO MUST BE DETERMINED BY THE BILLS OF LADING IS FULLY SUPPORTED BY THE EVIDENCE AND IS IN CONFORMITY WITH THE LAW OF THE CASE.

The libels allege, and the fact is, that the "Hindanger" sailed from Seattle March 28th with 4000 cases of eggs on board. The bill of lading covering the shipment (Exhibit A) shows that the goods were shipped

by Washington Cooperative Egg and Poultry Association, consigned to the order of L. Van Bokkelen, Inc.; on the M. S. "Hindanger"; from the port of shipment, Seattle, Washington; to the port of destination, Buenos Aires; at the freight rate of 70¢ per case, prepaid, and bears date Seattle, Washington, March 28, 1930. The bill of lading covering the San Francisco shipment shows the shipper, Pacific Egg Producers Cooperative, Inc.; the consignee, order of Pacific Egg Producers Cooperative, Inc., notify L. Van Bokkelen, Inc.; the port of shipment, San Francisco; the vessel, M. S. "Hindanger"; the port of destination, Buenos Aires; 11,000 cases of eggs; freight 70¢ case, prepaid, and bears date April 7, 1930. The vessel sailed April 10th. The record establishes that these bills of lading were issued and accepted. There is no testimony that there was any objection to them, their conditions, the time of shipment, or arrival of the goods, or course of the voyage until the filing of these libels. These bills of lading are made up by the shippers or suppliers of the eggs themselves (Tr. 365) and are presumably correct.

Libelants allege, and respondents deny, that the shipments of eggs, the subject of this litigation, were made pursuant to an oral contract between the parties hereto. Respondents allege, and the record proves the allegation, that no oral contract was executed between these parties and that the shipments were made pursuant to the terms and conditions of bills of lading introduced in evidence by respondents (Exhibits "A"), (Tr. 42, 43, 62, 63). These bills of lading were prepared by libelants, as shippers (Tr. 365).

The Commissioner has found that the rights of the parties hereto must be determined by these bills of lading (Tr. 88). None of the witnesses for libelants denied the execution, receipt or acceptance of these bills of lading, or that they constituted the only contracts of carriage existing between these parties. *Each of the witnesses for libelants denied that he had made any oral contract with respondents for the carriage of the goods.*

In the absence of any showing to the contrary (and the record in these cases makes no showing to the contrary), the acceptance of a bill of lading is deemed in law to be an acceptance of the terms of the bill of lading and constitutes the contract between the carrier and shipper.

By stipulation it is admitted that the bill of lading covering the shipment set forth in the libel and answer is in the phrases of Exhibits "A" (Tr. 77, 81).

Exhibits "A", as heretofore set forth, show the shipper, consignee, port of shipment, port of destination, quantity of goods shipped, rate of freight, and name of the carrying vessel, and contain the terms of the contract of carriage in the customary form of bills of lading. All of the essential requisites of a contract are present. The bills of lading constituted the only contracts between these parties and establish their rights (88).

Appellees-respondents objected at the hearing to the introduction of any evidence tending to alter or vary the terms of the written contracts or bills of

lading, and argued the objections before the Commissioner, citing therein numerous decisions in support of its position (Tr. 154, 175, 182, 183). The Commissioner and the court below found that the rights of the parties must be determined by the bills of lading (Tr. 88, 100, 105).

In *The Orizaba,* 1929 A. M. C. 665, on a conflict in the testimony, the court held in respect to the bill of lading being a contract of carriage as follows (p. 668):

> "This may well be true, but I do not think it is necessary to so find, because in the absence of an agreement expressly incorporating the bill of lading, there is an implied understanding or agreement arising from common business experience, that a carrier will issue its customary bill of lading prescribing liability, and the shipper is bound by its provisions. Luckenbach S. S. Co., Inc., v. American Mills Co., 1928 A. M. C. 558, 24 F. (2d) 704; Santa Clara-Point Judith, 1928 A. M. C. 974; Henry S. Grove, 1923 A. M. C. 1021, 1024.
>
> The law requires and it must be presumed that a bill of lading will be issued.
>
> In the instant suit, however, if my finding is right, we do not have to go so far, because a bill of lading in its regular form was issued by the carrier and accepted by the shipper without the notation of short shipment, and became, as of the date of shipment, the contract of the parties, and that was not changed by the subsequent notation of short shipment."

The Henry S. Grove, 1923 A. M. C. 1021 (District Court of Washington), is a case where a firm book-

ing was made on a letter written by the carrier and accepted in writing by the shipper, and several days after the cargo was loaded and the ship sailed the bill of lading was forwarded to the libelant by mail. It was not signed by the shipper. This bill of lading contained provisions in respect to filing claims and commencing suit. In holding that the bill of lading constituted the contract between the parties, the court held, in part, as follows (p. 1024):

> "The mere booking stipulation does not preclude the issuance or acceptance of a bill of lading by the shipper as expressing the terms of the agreement between them, and when this is done both the parties are bound by its provisions. In the instant case the only agreement is to ship the cargo for a stated compensation. There are no limitations of any sort, not even perils of the sea excepted. It is apparent, I think, from the entire record that the bill of lading was understood by all of the parties as intended to express the real contract by which the mutual obligations of the parties were to be governed, The Caledonia, 43 Fed. 681; The American R. Exp. Co. v. Lindenberg, 260 U. S. 584."

Here we have a written booking admitted by the parties, and the court clearly held that the bill of lading expressed the terms of the agreement of shipment between the parties. If this were not so, it would be impossible for shippers to make, and carriers to accept, bookings for cargo to be shipped or to engage in preliminary oral or written negotiations prior to the issuance of the formal contract of carriage as evidenced by the bill of lading. The proposal

of appellants in this case is so preposterous that a citation of authorities is hardly necessary to establish that the bill of lading must be held to be the contract of carriage. Not only has no oral contract been proved, but even had one been proved, it seems clear from the better reasoned cases that the written formal contract as evidenced by the bills of lading entered into subsequent to the oral or preliminary written negotiations is the contract binding upon the parties.

In *The Surailco,* 1928 A. M. C. 682 (C. C. A. 2d), a complaint was laid upon an oral contract between the parties, which oral contract was denied by the carrier with the allegation that the goods were shipped under bills of lading. Excusing the delay complained about, Judge Learned Hand, in reversing the judgment below, held (p. 684):

> *"We agree that the bill of lading was the only contract between the parties, and that it took the place of the prior oral contract as the final memorial of the parties' obligations,* Delaware, 81 U. S. 579; Caledonia, 157 U. S. 124, 139; Guillaume v. General Transp. Co., 100 N. Y. 491, 498 (semble)."

In the case of *Western Lumber Mfg. Co. v. United States* (D. C. N. D. Cal.), 9 Fed. (2d) 1004, the respondents contended that the loading of the cargo "was done pursuant to oral arrangements made with all but one of the shippers, but on the part of the respondents the existence of any such arrangements is vigorously denied" (p. 1006). Respondents relied upon special agreements referred to in the case, ac-

cording to which no deviation took place. The court held (p. 1006):

> "With this position there are more difficulties than one. To begin with, the rule which excludes parol evidence of variations of the terms of a written contract is clearly applicable to all verbal agreements entered into prior to or contemporaneously with the execution of the bills of lading. The Delaware, 14 Wall. 579, 606, 20 L. Ed. 779; The West Aleta, supra (7 Fed. (2d) 893, 895)."

The same court, the case of *The West Aleta,* 7 Fed. (2d) 893, had before it a similar contention made by respondents. The court found that bills of lading were issued in the usual form (893), and in answer to the respondent's plea for the admission of extraneous evidence, held:

> "If there is any rule of law which is settled beyond contradiction, it is the rule that parol evidence is inadmissible to vary the terms of a written contract,"

and as in this case, the court there held that even aside from this question the evidence was wholly insufficient to establish the facts sought to be established, namely, in the instant case, that an oral contract existed. This case was affirmed by the Circuit Court of Appeals for the Ninth Circuit, and reported in 1926 A. M. C. 855, 12 Fed. (2d) 855. It was reversed by the Supreme Court on other grounds, namely, that the suit was barred by the provisions of the Suits in Admiralty Act of 1920. (*West Aleta,* 276 U. S. 202; 72 L. Ed. 531.)

In *The Sidonian,* 34 Fed. 805, the libelant, the shipper of cargo, took from the vessel a bill of lading giving it permission to call at any port or ports. Evidence was given to show that the agent of the vessel gave the shipper to understand that the vessel would not call at a quarantine port. Nevertheless, the shipper thereafter accepted the bill of lading without objection. The ship did so call and was detained, causing damage to the shipper's fruit by delay. In holding that the bill of lading governed the rights of the parties, and dismissing the libel, the court said:

> "There is evidence to show that, prior to the shipment of the lemons the agent of the shipowner gave the shipper to understand that the ship would not call at Palermo on this voyage. But it also appears that, upon the shipment of the lemons, the bill of lading upon which this action is based was issued by the ship, and received by the shipper without objection; the fact of the establishment of the quarantine at Palermo being then known to all parties. Thereafter the ship called at Palermo, that being one of the ports ordinarily touched at by the vessels of this line on their voyage to New York, and in consequence was detained by the quarantine 10 days. Upon these facts the libelant asks at the hands of this court a construction of the bill of lading so as to exclude the port of Palermo from the liberty to call mentioned in the bill of lading, upon the ground that, after the establishment of the quarantine, the port of Palermo could not be entered under ordinary circumstances, and so was not within the contemplation of the parties to the contract. But I am unable to see how such a construction can be given to the bill of lading.

> The words of the liberty to call are plain, and clearly include the port of Palermo. If the shipper had desired to exempt the port of Palermo from the liberty to call contained in the bill of lading, because of the quarantine then known to have been established, he should have procured a modification of the bill of lading. Instead of so doing he accepted the bill of lading without objection, and now brings his action upon it. It is impossible to permit him to recover in such an action, without setting aside the established rule which makes the written contract the evidence of the agreement between the parties. The libel must be dismissed, and with costs."

This case was affirmed by the Circuit Court of Appeals for the Second Circuit and is reported in 35 Fed. 534, and there can be no doubt that this is sound law.

In the leading English case on the subject, *Leduc v. Ward,* 20 Q. B. D. 475, 6 Asp. Mar. L. Cas. 290, Lord Esher, speaking for the Court of Appeals, held:

> "But if the goods have been received on board, the bill of lading is more than a receipt, it is a contract of carriage. The captain has authority not only to make a contract of carriage, but to reduce it into writing. The bill of lading is, between him and the shipper, the contract for the carriage of the goods reduced into writing. Whenever a contract is reduced into writing, that writing is the only evidence of the contract. It can only be varied by showing a usage so general that it must be taken to be imported into the contract. That is the only evidence that can be given outside the written contract. To show that the par-

ties have agreed to some other terms outside the contract is to seek to vary the terms of a written contract, and that is not allowed with regard to a bill of lading any more than it is with regard to any other contract which has been reduced into writing as the evidence of the contract. It is startling to be told that this is new law * * * ."

In the case of *The Henry B. Hyde,* 82 Fed. 681, 683, affirmed 9th C. C. A. 90 Fed. 114, in a libel for alleged damage to shipment of goods by breakage, the District Court for the Northern District of California, in relieving the vessel from liability in accordance with the terms of the bill of lading, held:

"A bill of lading is an instrument well known to the commercial law, and according to mercantile usage is signed only by the master of the ship, or other agent of the carrier, and delivered to the shipper. When thus signed and delivered, it constitutes not only a formal acknowledgment of the receipt of the goods therein described, but also the contract for the carriage of such goods, and defines the extent of the obligations assumed by the carrier. The Delaware, 14 Wall. 579. In my opinion, the rule which governs the point now under consideration is that a common carrier may, by special contract with the shipper, stipulate for a more limited liability than that which he assumes under the ordinary contract for the carriage of goods; and such special contract, in the absence of any statute to the contrary, may be contained in a bill of lading signed by the carrier alone; and the acceptance of such bill of lading by the shipper at the time of the delivery of his goods for shipment, in the ab-

sence of fraud on the part of the carrier, is sufficient to show the assent of the shipper to the terms set out in the bill of lading. It is the rule, rather than the exception, for common carriers to stipulate for a release from the stringent liability of an insurer, and which otherwise the law would impose upon them; and according to the customary course of business such stipulations are contained in the bill of lading issued by the carrier. This custom is so general that all persons receiving such bills of lading must be presumed to know of such custom, and they are also charged with the knowledge that it is one of the offices of such instruments to state the terms and conditions upon which the goods therein described are to be carried; and for this reason the acceptance of such a paper by the shipper, without dissent, at the time of the delivery of his goods for shipment, when no fraud or imposition has been practiced upon him, is to be regarded as conclusive evidence that he agrees to be bound by all lawful stipulations contained in such bill of lading, and this I understand to be the rule sustained by the supreme court of the United States in the case of Bank of Kentucky v. Adams Express Co., 93 U. S. 174, and is supported by the following well-considered cases: Kirkland v. Dinsmore, 62 N. Y. 171; Grace v. Adams, 100 Mass. 505; Dorr v. Navigation Co., 11 N. Y. 485; Railroad Co. v. Pontius, 19 Ohio St. 221; McMillan v. Railroad Co., 16 Mich. 79. In the case last cited, Mr. Justice Cooley, speaking for the court, said:

> 'Bills of lading are signed by the carrier only; and, where a contract is to be signed only by one party, the evidence of assent to its

terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds poll, and with various classes of familiar contracts; and the evidence of assent derived from the acceptance of the contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing.' "

In *McMillan v. Michigan Southern etc. R. R. Co.*, 16 Mich. 79, 112, Mr. Justice Cooley said:

"A bill of lading proper is the written acknowledgment of the master of a vessel that he has received specified goods from the shipper, to be conveyed on the terms therein expressed, to their destination, and there delivered to the parties therein designated. Abbott on Shipping, 322. It constitutes the contract between the parties in respect to the transportation, and is the measure of their rights and liabilities, unless fraud or mistake can be shown. * * *

Bills of lading are signed by the carrier only; and where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in its receiving and acting upon it. This is the case with deeds-poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not perceive that bills of lading stand upon any different footing.

In Glyn v. East & West India Dock Co. (1882), 7 A. C. 591, 596, Lord Selbourne said:

'The primary office and purpose of a bill of lading, although by mercantile law and usage

> it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner.'
>
> In the Supreme Court in The Delaware, 14 Wall. 579, it was held that the bill of lading imported a contract and that evidence to vary it ought not to be admitted.
>
> And Carver on Carriage of Goods by Sea (6th ed.) Sec. 50, speaking of a bill of lading, states that it 'sets out the fact that the goods have been shipped and the terms upon which they are to be carried and delivered'."

In *The Delaware,* 81 U. S. 579, 20 L. ed. 779, the Supreme Court of the United States held, in part, as follows:

> "If there is any rule of law which is settled beyond contradiction, it is the rule that parol evidence is inadmissible to vary the terms of a written contract."

In that case the defense for non-delivery, as set up by the respondent, was that an oral agreement existed between the libelant and the master of the vessel before the shipment of the goods or the signing of the bills of lading that the goods which were lost might be stowed on deck. The respondent insisted that the goods not delivered were stowed on deck by the consent of the shippers and in pursuance of an oral agreement between the carrier and the shippers consummated before the goods were sent on board and before the bill of lading was executed (p. 782). The libelants objected to this evidence as repugnant to the agreement set forth in the bill

of lading—the exact position of respondents-appellees herein. The Supreme Court, in rejecting the evidence, held as follows (p. 782):

> "Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described, from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated. Abb. Ship. (7th Am. ed.), 323; O'Brien v. Gilchrist, 34 Me., 558; 1 Pars. Ship., 186; Macl. Ship., 338; Emerigon, Ins., 251. Regularly the goods ought to be on board before the bill of lading is assigned, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as, if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Rowley v. Bigelow, 12 Pick., 307; The Eddy, 5 Wall., 495 (72 U. S., XVIII., 489). Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods

to the consignee or other person therein designated, and upon the terms specified in the same instrument. Macl. Ship., 338, 339; Smith's Mer. Law (6th ed.), 308. Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. Bates v. Todd, 1 Moo. & Rob., 106; Berkley v. Watling, 7 Ad. & E., 29; Wayland v. Mosely, 5 Ala., 430; Brown v. Byrne, 3 E. & B., 714; Blaikie v. Stembridge, 6 C. B. (N. S.) 907. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely prima facie evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence."

And further (p. 783):

"*Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are, in general, inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract.* Ruse v. Ins. Co., 23 N. Y., 519; Wheelton v. Hardisty, 8 Ell. & Bl., 296; 2 Sm. L. Cas., 758; Ang. Car. (4th ed.) sec. 229."

In the early case of *The Golden Rule,* 9 Fed. 334, in response to a plea that parol evidence was admissible to establish an oral contract the court held:

> "Such a defense cannot be listened to, as otherwise every bill of lading could be altered or varied by the recollections of a steam-boat mate, or the interference of disinterested parties. The carrying contract, reduced to writing in a bill of lading, can no more be altered or varied by parol evidence than any other written contract. See The Delaware, 14 Wall. 579. But, outside of this, unauthorized parties certainly cannot change the contract between the ship and the shipper."

This is undoubtedly sound law. Were it not so, every shipper aggrieved in respect to the transportation of his goods would seek to set aside the written contract of carriage as evidenced by the bills of lading in favor of any oral agreement which he might be able to convince the court existed. In the instant case, respondents deny the existence of any oral agreement with these appellants and the Commissioner and the court below found that no such agreement existed.

Appellants, in their brief herein, pages 16 to 41, cite 17 decisions in support of their contention that the bills of lading herein are not the contracts establishing the rights of the parties hereto. This contention is the same contention made before the Commissioner and the court below, and is contrary to the specific finding of both the Commissioner and the court (Tr. 87, 100, 105). *It must be borne in mind that the finding of fact by the court that no oral*

contract was consummated between these parties (Tr. 87) *is a finding based upon the testimony of each of the witnesses for appellants that none of them made a contract with respondents, appellees,* and the testimony of witnesses for the respondents, appellees, that no oral contract was made with the libelants, appellants. Indeed, it can hardly be said that there is any conflict in the testimony in respect to the absence of any oral contract. All agreed that there was none between these parties. Every decision cited by appellants (their brief pages 16 to 41) herein in support of their contention that an oral contract existed were cited to the Commissioner and the court below. Not one single case referred to in that part of the brief commencing on page 16 and ending on page 41 holds anything other than that where an oral contract of affreightment is proved, it is binding upon the parties.

In the *Northern Pacific* case (Brief p. 17), an exchange of letters showed a definite offer and acceptance establishing a contract for the transshipment of goods before a definite day. Respondents' agent wrote, "I have made a contract guaranteeing delivery of this supplement at Yokohama by our S. S. Tacoma, sailing Oct. 30th" (p. 274). A definite binding contract was made long prior to the shipment or issuance of the bill of lading.

In the *Bostwick* case (Brief p. 18), a similar exchange of written correspondence created a contract.

In the *Mar Mediterraneo* (Brief p. 19) the court merely had before it exceptions to a libel alleging an

oral contract. There was no ruling on the merits, and indeed the court held that if it appeared at a trial on the merits that no oral contract had been consummated, a different situation would exist.

In the *Isle de Sumatra* case (Brief p. 19), a written agreement previous to the issuance of a bill of lading indicating the order of ports of call bound the parties.

In the *Julia Luckenbach* case (Brief p. 20), the respondent itself admitted the bill of lading not to have been the contract, agreeing with the libelant that a contract preceded the issuance of the bill of lading.

In the *Arctic Bird* case (Brief p. 21), a written contract for the carriage of goods was entered into between the parties prior to the issuance of a bill of lading, which latter the court held could not vary the terms of the previous written contract.

In the *Citta di Palermo* case (Brief p. 21), a verbal contract between the parties was proved and not denied. The shipper protested against accepting a bill of lading issued after the goods had been shipped.

In *Burns v. Burns* (Brief p. 23), after holding that the opinion of a trial judge upon conflicting evidence will be assumed to be correct on appeal, the Circuit Court held (131 Fed. 239):

> "Ordinarily, when goods are delivered to a carrier for transportation, and a bill of lading is delivered to the shipper, the latter is bound to examine it and ascertain its contents, and, if he accepts it without objection, he is bound by its terms, and resort cannot be had to prior

> parol negotiations to vary it, nor can he set up ignorance of its contents. On the other hand, if the goods are accepted for transportation by the carrier without any receipt or bill of lading being issued, the subsequent delivery to and acceptance by the shipper or his agent of such an instrument will not constitute a binding contract, for in such cases there is no consideration for the subsequent agreement."

Both the District Court (125 Fed. 432) and the Circuit Court of Appeals (131 Fed. 238) found that a contract for the carriage of coal was entered into between the parties prior to the issuance of a bill of lading which was not delivered until after the goods were shipped.

Respondents contend (Brief p. 24) that

> "Where an oral contract is *actually* entered into between the parties, the bill of lading does not supersede that contract in the absence of proof of an intention that it should."

And further:

> "Obviously the parties would no more intend that the bill of lading should express the terms of their agreement when there was an actual meeting of the minds than when each thought that the shipments were moving pursuant to an oral contract."

Appellant's difficulty is that in the instant case no oral contract was *actually,* or otherwise, entered into and it was so found by the Commissioner and court below and admitted by libelants' witnesses, and, further, the allegation that *each,* if it refers to libelants

and respondents herein, thought the shipments were moving under an oral contract is, to say the least, a stretch of the imagination. Respondents knew these shipments were moving under the bills of lading and libelants, by accepting the bills of lading without objection, were presumed to have known the same and are bound by the bills of lading, as is established by the authorities, supra.

The *National Bank of Kentucky* case (Brief p. 25) held that if there is no meeting of the minds, no contract results. It is hardly necessary to cite any such elemental rule to this court. The meeting of the minds in the instant case resulted in a delivery and acceptance without objection of the regular bills of lading of these respondents. This rule of law is established by a long line of cases and as cited heretofore.

In the *Walton N. Moore Drygoods Co.* case (Brief p. 29), a verbal agreement for sailing on a specific date was proved and not denied. The respondent was held at fault for its error in cancelling the space on the vessel and transporting the goods at a different date.

The *Iossifoglu* case (Brief p. 29) holds nothing more than that liability may rest for proved delay.

In the *Armendaiz Brothers* case (Brief p. 30), suit was based upon an oral contract which the court found to exist, in which contract the respondent carrier had represented a sailing date as a warranty. In that case it was proved that representatives of the respondent informed the libelant in respect to the sailing date of the vessel and represented that it would be

not later than a certain date, upon which basis the libelant entered into binding contracts for the sale of its goods. Delivery permits were issued by the respondent setting forth the date when the goods should be delivered to the vessel, which was within the time originally warranted. Contrary to these agreements, the vessel sailed over a month late. In the instant case it was not established to the satisfaction of the court below that any such warranty was given by these respondents.

In the *Gray v. Moore* case (Brief p. 38), the time of arrival of the vessel was specified in the contract, and both parties contracted with regard to it.

In *The Texandrier* case (Brief p. 39), the contract of affreightment specified the arrival time of the vessel.

In the *Bolle Watson* case (Brief p. 39), a contract was agreed upon for the time of sailing of the vessel.

In the *Williams Steamship Company* case (Brief p. 20), a definite contract to load on a given date was found to exist by reason of a notification given by the respondent to the libelant.

In the *Boak* case (Brief p. 40) and in the *Cohn* case (Brief p. 40), prior contracts were proved.

Not a single one of these cases can materially aid this court. In the light of the evidence, which fails to establish the existence of any such alleged oral or prior contract, the bills of lading are, as found by the Commissioner and court below, the only contracts between these parties and determine the rights of the parties.

V.

THERE WAS NO UNPERMITTED DEVIATION ON THE VOYAGE OF THE "HINDANGER" AS CONTEMPLATED BY THE CONTRACT BETWEEN THE PARTIES AND IN ACCORDANCE WITH THE DECISIONS ON THE SUBJECT.

Having established that the bills of lading are the only contracts between these respondents, the law is well settled that no unpermitted deviation was made by the respondents in the voyage from the Pacific Coast to Buenos Aires. The evidence shows that all of the ports at which the vessel stopped were ports between the loading port and the discharge port named in the contracts of carriage as evidenced by the bills of lading. The bills of lading permitted the vessel (Tr. 154) "either before or after proceeding toward the port of discharge, to proceed to said port via any port or ports in any order or rotation, outwards or forward, whether in or out of or in a contrary direction to or beyond the customary or advertised route. * * *"

In the instant case, the schedule of ports at which the vessel called from the time it left Seattle, Washington, March 28, 1930, until it arrived at Buenos Aires on May 29, 1930, is shown by stipulation entered into between the parties (Tr. 78, 81) and indicates, and as is disclosed by the map, that the ports of call complained of by appellants, Bahia and Pernambuco, are in geographical order between the Pacific Coast and Buenos Aires.

The Commissioner and the court below found (Tr. 88, 101, 105) that stopping and discharging at the different ports in geographical rotation was not a

deviation; that there was no negligent delay shown, and the time consumed on the voyage was not a deviation. We submit that in view of the facts of the case and the great weight of authority, this finding is sound and should not be set aside.

Appellants suggest that the court might find that the shipments moved under an implied contract (Brief p. 41). It is proved that the shipments moved under a written contract, as evidenced by the bills of lading.

Appellants next suggest that this court must determine as an original proposition the voyage which the carrier was obligated to make. The voyage the carrier was privileged to make was that contemplated by the contracts of carriage as evidenced by the bills of lading considered in relation to the decisions of innumerable courts construing similar contracts.

Libelants raised this issue of deviation in their libel and in their exceptions to respondents' answer, which exceptions were argued before the trial court and overruled. The same point was raised and argued before the Commissioner, with a finding that no deviation occurred. The same point was raised and argued before the trial court on exceptions to the Commissioner's report. The trial court likewise found that no deviation existed.

The decisions cited in appellants' brief (pp. 40 to 46 inclusive) were all presented below. None of them have any bearing on the instant case in the light of the liberties permitted by the bills of lading or contracts of carriage.

In *The Pinellas* case (Brief p. 42), the court specifically found (1929 A. M. C. 1301, at 1314) that no permission was given by the bills of lading for the vessel to be towed, which was the act complained of, and in the absence of any such permission, the court naturally concluded a deviation had occurred.

In *The Robin Hood* case (Brief p. 43), the vessel called at a port in the reverse order en route to the port of discharge and not at a port on the route between the two ports named in the bill of lading. As the court held, "The ship had to retrograde", and as this was not a liberty permitted in the bill of lading, it was held to be a deviation.

In *The Hermosa* case (Brief p. 23), the vessel was held to have been unseaworthy, causing an unwarranted delay, by reason of the intoxication of the master.

In *The San Giuseppe* case (Brief p. 24), the court held the vessel liable for an unwarranted delay due to the lack of diligence of the owners in getting a crew and repairing the vessel with all the cargo on board. In both of the last two mentioned cases, the cargo was loaded on board the vessel and the delay occasioned after the loading and prior to the sailing. Certainly no such situation exists in the instant case.

In the case of *General Hide & Skin Corporation* (Brief p. 45), after commencement of the voyage, on a course indicated by the advertisements, and as contemplated by the parties when the voyage commenced, the vessel was diverted to a longer course, through the Suez Canal. In the instant case, there was no

change of course at any time. When the vessel set sail from Pacific Coast ports of North America, it intended to and later did call at all of the ports of call in South America as contemplated. There was no diversion en route as was the situation in the cited case.

We have disposed of all the cases of deviation cited by appellants in their brief and claimed to apply in the instant case. It is submitted that none of them are applicable. As stated, the voyage of the "Hindanger" was not a deviation, and the ports of call were made in geographical order between the loading and discharging ports.

In a leading case in the Ninth Circuit—that of *Tokuyo Maru (W. R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha)*, 7 Fed. (2d) 889, 1925 A. M. C. 1420, decided in 1925, the court held, in part, as follows, after referring to numerous decisions, both English and American, on the subject of deviation:

> "As a conclusion from all the cases, it is apparent that the 'general liberty' clause is not treated as of 'no effect'. It is a stipulation of the parties, to be given effect, like other stipulations, in so far as it does not conflict with the Harter Act (Comp. St. Secs. 8029-8035), or the general purpose and policy of the law, or the real intent of the contract between shipper and carrier. It may be fairly said that reservations by a carrier of general liberties of departure from the route of the contractual voyage must be read in due relation and subordination to the main commercial purpose of the contract of affreightment, and as a matter of law will justify only such devia-

tions from that route as are consistent with that particular commercial purpose.

The propriety of any particular deviation is a question of fact in each case and there is no fixed rule for such determination. It is a question of inherent reasonableness, and pertinent to the inquiry of the surrounding circumstances, namely the commercial adventure, which is the subject of the contract, the character of the vessel, the usual and customary route, the natural and usual ports of call, the location of the port to which the deviation was made, and the purpose of the call thereat."

It is submitted that the propriety of the particular voyage pursued by the vessel is a question of fact which must be determined by the court in the light of all of the circumstances applicable to the situation at hand and that question of fact has been resolved in favor of respondents by the trial court and should not be disturbed. Such is the ruling of the foregoing decision. This case was affirmed by the Circuit Court of Appeals 9th Circuit and is reported in 1926 A. M. C. 862, 12 Fed. (2nd) 519.

That the liberty given under the most restricted clauses in general use permits of the calling at ports between the two named termini and in geographical order has long since been determined. As was held by the court in the foregoing case (p. 891):

"The foundation for most of the cases upon general liberty clauses in bills of lading seems to be the opinion of Lord Herschell in Glynn v. Margetson (1893), A. C. 351. The principle laid down is as follows: 'The ports, a visit to which

would be justified under this contract, will no doubt differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must in my view be a liberty consistent with the main object of the contract, a liberty only to proceed to and stay at ports which are in the course of the voyage. In that, of course, I am speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed, that was argued by the learned counsel for the appellants), inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports in the way between Malaga and Liverpool, and those are the ports at which I think the right to touch is given.' "

The decision in *Glynn v. Margetson* is undoubtedly one of the outstanding decisions of the English courts on the subject of deviation. Since that decision and the earlier American rulings on the subject, vessel owners have gradually enlarged the liberties contained in the contracts of affreightment permitting a wider scope than the voyages pursued, but in no case, it is submitted, have the courts of England or the United States held a call at ports in geographical order between the named termini in a bill of lading to have been an unwarranted deviation or in violation of the Harter Act.

In the case of *The Emelia S. de Perez,* 1923 A. M. C. 42, affirmed 288 Fed. 1019, Judge August Hand,

then and now a leading authority on admiralty matters, held that a vessel carrying cargo to fourteen Spanish ports which proceeded 125 miles beyond the port of Valencia, to which the goods were consigned, and transshipped them back was not liable for deviation and that the vessel's course was not unreasonable:

> "The ship *Emelia S. de Perez* was chartered by the claimant, Ocean Transportation Company, for a trip to Cadiz and Barcelona, but took a cargo for fourteen different Spanish Ports. It was the custom of the claimant to transship cargo for the North of Spain at Cadiz, and for the South of Spain at Barcelona. Accordingly the ship did not stop at Valencia but landed the merchandise at Barcelona and transshipped it by steamer back to Valencia, a distance from Barcelona of about one hundred and twenty-five miles. She left New York May 26, 1916, arrived at Barcelona June 6, and at Valencia June 7. The libel is filed for damages caused by the delay and alleged deviation in not going direct to Valencia.
>
> If the liberal clause of the bills of lading is to be given any latitude at all, it should cover such a comparatively small departure from the straight route to Valencia as occurred here. I can see no practical difference between this case and the deviation from New York to Philadelphia which was justified by Judge Learned Hand in his unreported opinion in the *Blandon,* dated March 30, 1922. It is true that in the *Blandon* the ship did proceed to her destination, but the clause here permitting the vessel to transship was as applicable to a near port beyond Valencia as to Cadiz which was much farther than Barcelona from Valencia. The bills of lading here per-

> mitted the vessel not only to go out of the customary route and to transship, but also to proceed beyond. The question is really one of degree and reasonable conduct and I think the ship was justified in doing what it did here. South etc. Line v. London Stores, 255 Fed. 306; The Kansas, 87 Fed. 766; Hadji Ali Akbar & Sons v. Anglo-Arabian and Persian S. S. Co. (1906), 11 Commercial Cases, p. 219."

In that case the bill of lading permitted the vessel to deviate, "to proceed to the port stated in this bill of lading, via any port or place en route or beyond, in any order, whether in or out of the customary or advertised route for any purposes whatever * * *"

In the case of *The Blandon,* 1923 A. M. C. 242, Judge Learned Hand held that a vessel carrying goods under a bill of lading from New York to Valencia which provided in part as follows:

> "with liberty to call at any port or ports in or out of the customary route in any order",

had not committed a deviation by stopping at Philadelphia after loading at New York and before proceeding to Valencia.

In the case of *The Panola,* 1925 A. M. C. 1173, the Circuit Court of Appeals for the Second Circuit had before it a claim for alleged deviation and delay on a cargo shipped from Philadelphia to Helsingfors, Finland, the contention being that after the vessel had loaded the cargo at Philadelphia, a voyage to New York and return to Philadelphia before putting out for Finland constituted a deviation and rendered the

vessel liable. In the cited case the bill of lading provided, in part, as follows:

> "1. * * * The vessel with the goods on board, either before or after proceeding toward the port of discharge, may remain in port, proceed by any route and deviate from or change the advertised and intended route at any state of the voyages and may proceed to and stay at any places whatever, although in a contrary direction to or outside of, or beyond the usual route to the said port of discharge once or oftener, in any order, backwards or forwards, for loading and/or discharging cargo, fuel, stores, or passengers, and/or for any purpose whatsoever, that in the opinion of the shipowner or master may seem advisable. This liberty is not to be considered as restricted by any words of this contract whether written, stamped or printed."

In relieving the vessel owner from liability, the court held, in part, as follows:

> "In the absence of some agreement to the contrary a voyage must be commenced without needless delay, and must be prosecuted without unnecessary delay or deviation. The shipowner's agreement is that he will be diligent in transporting the goods to their destination and that he will do so without unnecessary deviation. And there can be no doubt that if the cargo which was to be carried to Finland by the Panola had not been received under such a contract as is disclosed in this record, and which gives a wide liberty to do things which otherwise would be deviations from the voyage, a liability on the part of the shipowner for such delays as oc-

curred in this case could not be successfully controverted.

It seems to us equally plain that under the bills of lading issued and accepted without protest in this case, and the wide liberty contracted for, the shipowner is not liable for the delay which occurred in the transportation of the cargo herein involved assuming the agreement is valid.
* * * * * * *

But no case has been called to our attention which holds that such a provision as that found in the bills of lading herein involved is void, and we are not prepared to hold it to be void. While the provision in question cannot be construed to be void or as intended to confer upon the shipowner an absolute and unrestricted liberty to delay for any length of time and for any reason or no reason, the transportation of the goods, still the intention of the parties must be so restricted and limited as to apply only to delays fairly ancillary to the prescribed voyage. In effect the promise of the shipowner was to carry the goods to their destination as soon as the reasonable arrangements of the carrier, respecting the voyage, would allow."

A thorough review of recent decisions on the subject is contained in the decision of the Circuit Court in the cited case, to which reference is respectfully made.

In the case of *The Frederick Luckenbach,* 1926 A. M. C. 1468, on a voyage from Portland, Oregon, to New Orleans, a vessel was permitted, after sailing from Portland, to proceed to Seattle before continuing on to New Orleans without the same being deemed to have been a deviation.

In the case of *The Eastern Tempest,* 1928 A. M. C. 70, the court had before it a situation where a vessel with a shipment of apples from New York to Hull proceeded via St. John, New Brunswick. The court held this to be no unwarranted deviation, and in so ruling, held, in part, as follows:

> "The bill of lading provided for the transportation of apples received in apparent good order 'by the steamship Eastern Tempest, now lying at the port of New York and bound for the port of Hull, or following or subsequent steamer, with liberty, in addition to any liberty expressed or implied in this bill of lading, to proceed to and use any port or ports, in any rotation for any purposes whatsoever, whether in or out of, or beyond, the customary or advertised route, and all such ports shall be deemed to be included in the intended voyage.'
>
> * * * * * * *
>
> On September 26, the steamer sailed from New York and proceeded to St. John, New Brunswick, where she arrived September 29, and where she loaded a large cargo of sugar. She sailed from there October 3rd and reached Hull October 19, with the apples in a damaged condition.
>
> * * * * * * *
>
> The libellant contends that the Eastern Temptest deviated by going to St. John, and that the deviation deprived the respondent of all benefits of the terms of the bill of lading and rendered the respondent liable as insurer for all damage suffered by the apples during the voyage, no matter from what cause arising. See Sarnia, 278 Fed. 459, 463; St. John's N. F., 280 Fed. 553, 556, affirmed, 1923 A. M. C. 1131, 263 U. S. 119, 124.

The Eastern Temptest was advertised as sailing for Hull without any reference to her going to St. John. Almost all respondent's Hull-Newcastle steamers made direct voyages to Hull and Newcastle. This was the only voyage to St. John made by any of respondent's Hull-Newcastle steamers up to that time.

There is no evidence that any other steamer bound from New York to British ports ever called at St. John.

In Panola, 1925 A. M. C. 1173, the Circuit Court of Appeals of this circuit considered a similar provision and held that the Panola which on August 31, 1921, at Philadelphia, accepted merchandise consigned to Helsingfors, Finland, and which was expected to begin her voyage from Philadelphia, September 5th, 1921, did not deviate by remaining at Philadelphia to September 8th, 1921, then going to New York, remaining there till September 30, 1921, and then returning to Philadelphia where she remained till October 5, 1921.

In Blandon, 1923 A. M. C. 242, 28 Fed. 722, approved in Panola, the Blandon loaded cargo at New York for Valencia, Spain, then proceeded to Philadelphia to load additional cargo, and returned to New York for additional cargo before sailing for Valencia. Judge Learned Hand said: 'Yet it was expressly agreed that the port might be "out of the customary route". What more limited sense can those words mean than a stop at a place some thirty hours away? It is said that the clause will allow only reasonable deviations, and this is indeed true, since such a clause is to be construed in its context. For example, it

might not allow a side voyage to Tampico or Galveston; certainly it would not permit a call at Rio or Montevideo. But it must mean to give the ship permission to steam by a different route from that she was otherwise bound to take, besides giving her leave to make ports of call en route, that is, in the customary route. *Such permission involves delay and was meant to involve delay. When contained in a bill of lading for a mixed cargo, it must be read as intended to give the ship some latitude in making up that cargo.'*

* * * * * * *

Under such circumstances, I can not find that the Eastern Tempest deviated by going with the apples to St. John, only 168 miles out of her direct course, for additional cargo.

Proctor for libellants having admitted that 'We are clear out of court unless we can show deviation', there must be a decree for respondent dismissing the libel."

In the recent case of *Callister v. United States Shipping Board Merchant Fleet Corporation,* 21 Fed. (2d) 447, affirmed 30 Fed. (2d) 1008), suit was commenced for the recovery of damages to 4000 barrels of apples carried from New York to Alexandria, Egypt, by the steamship "Half Moon". It was contended that the vessel deviated by not making Alexandria as the first port of call. (A similar contention is made in the instant case.) In the cited case, the court held as follows (p. 450):

"The securing of sufficient freight for the East Indies when outward bound on the voyage was not possible, and the ships of the Kerr Line and other ships bound for the East Indies were in the

habit of taking cargo for Mediterranean ports, the ship in question, the Half Moon, having stopped at Genoa on her previous voyage, and the West Mahomet, the last vessel to sail in this service before the voyage of the Half Moon, had also stopped at Genoa.

The bills of lading prepared by Barr, as well as the copy of the bill of lading attached to and made part of the agreement of November 1, 1922, provided:

> 'With liberty either before or after proceeding toward the port of discharge to proceed to, or toward, call, enter, or stay at any ports or places whatsoever, although in a contrary direction to, or out of, or beyond, the route to the said port of discharge, once or oftener, in any order backward, or forward, for loading or discharging fuel, cargo, or passengers, or for any purposes whatsoever, and the same shall not be deemed a deviation, but shall be deemed included within the intended voyage.'

Torre Annunziati was a stop on the customary route of vessels in that service, and in making that stop the distance was increased not more than 180 to 250 miles over the direct course from New York to Alexandria, and the stop at Torre Annunziati was within the liberty accorded to the Half Moon in the usual bill of lading of the Kerr Line and the bill of lading prepared by Barr and executed by the Kerr Line. The Sidonian (D. C.) 34 F. 805, affirmed (C. C.) 35 F. 534; The Panola (C. C. A.) 9 F. (2d) 733, 1925 A. M. C. 1173, at page 1185."

From the foregoing decisions, we submit that it is apparent that the provisions of the bill of lading in

the instant case applicable to the voyage being pursued from the Pacific Coast to Buenos Aires with calls at intermediate ports en route in geographical order are not such as to be avoided by reason of any provisions of the so-called Harter Act or otherwise. Indeed, as was held in the *Tokuyo Maru* case, the question of the propriety of a particular voyage is one of fact, having regard to the terms of the bill of lading and the circumstances surrounding the carriage of the goods in question. The Commissioner and court below found as a fact that no deviation or delay was occasioned and these findings should not be disturbed on appeal. It is further submitted that, as a proposition of law, the voyage of the "Hindanger" and its calls at intermediate ports in geographical order was proper and did not constitute a deviation.

The deviation complained of by libelants consisted of two alleged violations of the carrier's contract: (1) a calling at ports not properly within the voyage, which we have disposed of heretofore; and (2) a delay incidental to the voyage. Respondents, appellees, denied both of these contentions. The Commissioner and the court below found (Tr. 88, 101, 105) that no negligent delay has been shown, citing decisions (Tr. 89).

It is denied that there was any agreement concerning the dates of arrival and departure as alleged in the libel. It has been found that no contract existed prior to the execution and delivery of the bills of lading, which are silent in this respect.

In the leading case of *The Panola,* 1925 A. M. C. 1173, the court held that a delay of thirty-five days

on a voyage from Philadelphia to Helsingfors was not unreasonable for a general ship. This voyage from Philadelphia to Helsingfors is about 4000 miles. The voyage from Seattle to Buenos Aires is 9511 miles, and from San Francisco 8699 miles. The maximum delay alleged in the libel is nineteen days. We submit that there was no such delay and that at the time the goods were shipped the vessel was not scheduled to arrive in Buenos Aires on May 10th. The subject of delay is treated in the case of *The Panola* as follows:

> "In the absence of some agreement to the contrary a voyage must be commenced without needless delay, and must be prosecuted without unnecessary delay or deviation. The shipowner's agreement is that he will be diligent in transporting the goods to their destination and that he will do so without unnecessary deviation. And there can be no doubt that if the cargo which was to be carried to Finland by the Panola had not been received under such a contract as is disclosed in this record, and which gives a wide liberty to do things which otherwise would be deviations from the voyage, a liability on the part of the shipowner for such delays as occurred in this case could not be successfully controverted.
>
> It seems to us equally plain that under the bills of lading issued and accepted without protest in this case, and the wide liberty contracted for, the shipowner is not liable for the delay which occurred in the transportation of the cargo herein involved assuming the agreement is valid.
> * * * * * * *
>
> But no case has been called to our attention which holds that such a provision as that found

in the bills of lading herein involved is void, and we are not prepared to hold it to be void. While the provision in question cannot be construed to be void or as intended to confer upon the shipowner an absolute and unrestricted liberty to delay for any length of time and for any reason or no reason, the transportation of the goods, still the intention of the parties must be so restricted and limited as to apply only to delays fairly ancillary to the prescribed voyage. In effect the promise of the shipowner was to carry the goods to their destination as soon as the reasonable arrangements of the carrier, respecting the voyage, would allow.

So far as this unsatisfactory record discloses, the ship on her arrival at Philadelphia and New York cargo in her hold for discharge. After she had unloaded some of her cargo at Philadelphia she went to New York to discharge her New York cargo. This having been done, she loaded there certain cargo and then returned to Philadelphia to fill her holds. The delay at New York was due to the fact that the owner rearranged his cargo commitments—having eliminated some of his ships. The right 'to remain in port' given by the bill of lading justified holding the Panola until the owner could distribute his cargo between his various ships. Under the contract the owner was not obliged to dispatch the ship with half filled holds, or to leave unlifted any part of the freight he could carry. If it was necessary to eliminate a ship and consolidate cargoes it was not unreasonable to do it.

* * * * * * *

One of the leading cases holding that a shipper cannot recover damages for the loss of a market

is that of The Parana, 2 P. D. 118. The case was decided in 1877 in the English Court of Appeal. The ship which started from Manila and was to proceed to London was on the way from 65 to 70 days longer than the fair average time for such a voyage. She carried among other things a cargo of hemp. There had been a fall in the price of hemp between the time when the ship ought to have arrived and the time when she did arrive, and the hemp was finally sold at a considerable loss. The court, unanimously reversing the judgment of the Admiralty Division, held that the consignee was not entitled to recover damages arising from the loss of the market. Mellish, L. J., writing for the court, said:

> 'The question we have to decide is whether, if there is undue delay in the carriage of goods on a long voyage by sea, it follows as a matter of course that, if between the time when the goods ought to have arrived and the time when they did arrive, there has been a fall in the price of such goods, damages can be recovered by the consignee of the goods. * * *
>
> There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long voyage by sea, where there has been what may be called a merely accidental fall in price between the time when the goods ought to have arrived and the time when they did arrive—no case that I can discover where such damages have been recovered; and the question is, whether we ought to hold that they ought to be recovered. If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smith-

field, or fish is sent to be sold at Billingsgate, and, by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So, if goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, and if, by reason of breach of contract, they do not arrive in time, damages for loss of market may be recovered. Of if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum. But there is in this case no evidence of anything of that kind. As far as I can discover, it is merely said that when the goods arrived in November they were likely to sell for less than if they had arrived in October, for the market was lower.'

He stated the court's conclusion as follows:

'Therefore, upon the whole, we have come to the conclusion that the report of the registrar and merchants is right. They said that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accidents such as collisions goods were delayed in their arrival, it never had been the custom to include in the damages the loss of market; and we are of opinion that the conclusion which the registrar and merchants came to was right. The consequence, therefore, is, that the judgment of the Court below must be reversed.' ''

In the case of *The Neshaminy,* 290 Fed. 358 (5th C. C. A.), the court held the libelant not entitled to damages by reason of a decline in market value of the goods shipped on the "Neshaminy", stating as follows:

> "The decree appealed from sustained the claim of the appellee that it was entitled to recover the amount of its loss in consequence of the decline in the market price of the timber and lumber shipped between the date when it would have arrived at Liverpool if a Shipping Board steamer had been at Pensacola for loading during the first half of April, and had promptly taken aboard that timber and lumber and carried it direct to Liverpool, and the date of its actual arrival at that place. We think that above-mentioned provisions of the Neshaminy's bill of lading plainly show that it was not contemplated that the shipowner was to be liable for loss due to such delay in the arrival of the goods in question at their destination as was complained of. It was entirely consistent with the obligation incurred for the goods in question not to reach Liverpool sooner than they did. Compliance with the engagement of freight space for those goods did not involve the carriage of them directly to Liverpool, or within the time reasonably required for a voyage of a Shipping Board steamer from Pensacola to Liverpool. The shipowner would have been within its rights in making a round about voyage resulting in the ship reaching Liverpool later than it did, or in shipping or transhipping the goods in a sailing vessel which could not reasonably have been expected to reach Liverpool as soon as the Neshaminy did. The contract sued

on did not entitle the appellee to have the goods mentioned carried promptly and directly by a steamer to Liverpool. It is not entitled to recover damages for a failure to get the benefit of a service for which it did not contract.

It follows that the decree appealed from was erroneous in sustaining appellee's above mentioned claim. That decree is reversed."

We submit that this is a proper determination of the issues presented. The contract sued on in the instant case did not entitle the shippers to a direct or prompt carriage to Buenos Aires. The "Hindanger" is a general ship engaged in the carriage of general cargo, and this court will take judicial note of the fact that being so engaged it must load and discharge at numerous ports en route between the termini. Had the shipper desired immediate delivery, it should have so contracted for it. These goods would not, however, have moved on the "Hindanger" under such circumstances.

To the same effect, and holding that where a bill of lading authorized a call at the ports at which the vessel did call, the vessel owner was not liable for delay, is the case of *United States Shipping Board Emergency Fleet Corp'n v. Florida Grain and Elevator Co.* (5th C. C. A.), 20 Fed. (2d) 583. The court held that where the bill of lading exempted the vessel from liability for delay, the burden is upon the shipper to show that the delay was occasioned by the ship's negligence, and only then is the vessel liable for such delay. The Commissioner found "no negligent delay has been shown" (88).

Both Messrs. Wintemute and Reali, employees of the respondents, denied that there was any representation as to date of arrival of the "Hindanger" in South America, or the number of days which would be required for the voyage. Appellants rely upon a sailing card issued several months before the scheduled time of sailing of the vessel. At the time of the meetings between Mr. Wintemute and representatives of appellants, the former's representation as to the expected sailing dates from the two ports was one which could reasonably have been made at that meeting (February 15th) (Tr. 291-292):

"Q. At that meeting did you have any discussion as to the time of the voyage of the 'Hindanger' from San Francisco to Buenos Aires?

A. To the best of my recollection, no.

Q. I show you a sailing schedule which has already been introduced in evidence as Libelants' Exhibit No. 1, and ask you when that was sent out. I think you have already testified to this, but at the risk of repetition I will ask it again.

A. In November, 1929.

Q. At that time will you tell me when the 'Villanger' and 'Hindanger' respectively were scheduled to sail from San Francisco?

A. The 'Villanger' was scheduled to sail from San Francisco on February 12, and the 'Hindanger' from San Francisco March 18.

Q. This was November, 1929?

A. Yes.

Q. Can you tell me whether, at the time this schedule was sent out, in November, 1929, the position of those two vessels were such that the dates indicated were your reasonable expectation?

A. Yes, they were.

Q. This was November, 1929?

A. Yes.

Q. Can you tell me whether, at the time this schedule was sent out, in November, 1929, the position of those two vessels were such that the dates indicated were your reasonable expectation?

A. Yes, they were.

Q. Does that also apply as to the arrival dates of the two vessels in South America and particularly at Buenos Aires?

A. Yes.

Q. No schedules similar to this were subsequently sent out prior to the sailing of the 'Hindanger'?

A. No."

In the case of *Kerr Steamship Company v. Petroleum Export Corporation,* 1929 A. M. C. 905, the court held that the vessel was not liable for delay in arrival where at the time the representations were made the sailing dates indicated were reasonably expected to be fulfilled.

Ralph Bybee, witness on behalf of appellants, freight agent of McCormick Steamship Company, with whom appellants testified they had had dealings in shipments to South America over vessels of the McCormick Line, testified to a voyage of 46 days from San Francisco to Buenos Aires of a shipment of 5000 cases of eggs on the steamer "West Ira" (Tr. 372-373). He further testified in respect to reliance upon a sailing schedule issued in November as follows (Tr. 376):

"Mr. Graham. Q. I have just one more question. If you received a schedule such as that shown to you by Mr. Sapiro, issued in November, 1929, covering the sailing of vessels in March and April of 1930, would you place any reliance on it at all as to the sailing date or arrival dates?

A. If it was mailed out in November I wouldn't place much reliance on it after December.

Mr. Graham. That is all.

Recross Examination.

Mr. Sapiro. Q. That is, as to the time the boat was to leave, but you would still rely on the time it would take for the boat to go on the journey, wouldn't you?

A. No, sir.

Q. If you got the same information in a letter of January 27th, would it not confirm the same time, practically?

A. You mean for that same shipment?

Q. For the same distance, from San Francisco to Buenos Aires?

A. If I get the letter a few days prior to the date of sailing I would depend on it, otherwise I would not.

Q. You would not depend on it as a shipping man?

A. No.

Q. But you don't know what the shipper would do?

A. Well, my experience has been they don't depend on it very much.

Q. When they ask you how long it takes for a vessel to make a voyage and you tell them, do you think they depend on it?

A. Yes, sir.

Q. They do depend on that?

A. Yes, when they ask me prior to or close to the time of departure of the ship; but if they asked me, on the West Ira, in November, how long it would take it to go to Buenos Aires, I would probably have told them it took 34 days.

Q. What would you have told them in January?

A. I would probably have told them the same thing.

Q. When would you have changed the time?

A. When the boat was booked—when we had bookings on the boat."

Mr. Ralph V. Dewey, whose firm, Otis, McAllister & Co., handles one of the largest exporting businesses in San Francisco, and who is familiar with the habits and customs of the trade to South America, particularly to Buenos Aires (Tr. 384), and who testified to having received one of the sailing schedules on which libelants base their claim of delay (Libelants' Exhibit 1), further testified as follows (Tr. 384):

"Q. If you received a schedule such as this, Libelants' Exhibit 1, dated November, 1929, and if you had in mind making shipments on the Hindanger, would you place any reliance on the times of departure, arrival, or length of voyage as shown on that schedule of the 'Hindanger'?

Mr. Sapiro. I object to that as immaterial, irrelevant, and incompetent. This man's opinion as to what he would do, or his knowledge of the lack of reliability on shipping schedules is not material.

The Commissioner. Well, I think that goes to the weight of the evidence. I will allow it.

Mr. Sapiro. I don't see how it is of any materiality, your Honor.

The Commissioner. It is not very material. It simply goes to the weight of it.

A. I would rely on it as an intimation only, and if I were going to make a shipment I would check with the steamship company as to current dates.

Mr. Graham. Q. Being familiar with the export trade, as you have testified you are, do you know whether the export trade would place any reliance on such a schedule, any further than you have testified you would place any reliance on it?

Mr. Sapiro. The same objection.

The Commissioner. The same ruling.

A. I think no more."

And further (Tr. 386):

"If you received such a letter as that, dated as it is, and had in mind making shipments on the 'Hindanger' on March 24th, would you place any reliance on the statement as to time of departure and arrival, as shown there?

Mr. Sapiro. The same objection.

The Commissioner. The same ruling.

A. As between January 27 and March 24 I certainly would not rely on it as authentic information without checking further.

Mr. Graham. Q. How would you get that further information as to dates, schedule, and length of voyage?

Mr. Sapiro. Just a moment. That was not the last answer the witness made.

Mr. Graham. I would like to have the record read.

(Record read.)

Q. What would your answer be as to the schedule of the vessel? You have limited your previous answer as to departure and arrival.

A. You mean the length of the voyage, do you?

Q. The length of the voyage.

A. Well, as to the length of the voyage also, because ships of that line and others to South America have optional ports, if inducements offer, and those things change from day to day. Naturally, each additional port means additional time."

In the light of the evidence, the voyage of the 'Hindanger' was neither unreasonably long nor was there any delay for which these respondents, appellees, should be held at fault. Such was the finding of the Commissioner and the court below, and this finding should be affirmed.

VI.

THE DECREE OF THE TRIAL COURT SHOULD BE AFFIRMED AND THE LIBELS DISMISSED.

The decree of the trial court dismissing the libels should be affirmed. "No oral contracts were consummated between the parties" (Tr. 87). "The rights of the different parties, including the question of deviation, must necessarily be determined by the bills of lading" (Tr. 88). "Clearly the bills of lading involved in the instant matters endow the vessel with

a liberty to call at ports in geographical rotation, as did the 'Hindanger'" (Tr. 88). "No negligent delay has been shown. Stopping and discharging cargo at the different ports (in geographical rotation) between San Francisco and Buenos Aires was not a deviation; and the time consumed on said voyage was not a deviation" (Tr. 88). "The libels should, therefore, be dismissed" (Tr. 89), and the decree of the District Court affirmed.

Dated, San Francisco,
March 9, 1934.

Respectfully submitted,
LILLICK, OLSON AND GRAHAM,
IRA S. LILLICK,
CHALMERS G. GRAHAM,
Proctors for Appellees.

CHALMERS G. GRAHAM,
Advocate.

No. 7275

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POULTRY PRODUCERS OF CENTRAL CALIFORNIA (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees,

and

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

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Table of Authorities Cited

No. 7275

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POULTRY PRODUCERS OF CENTRAL CALIFORNIA (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees,

and

WASHINGTON COOPERATIVE EGG AND POULTRY ASSOCIATION (a corporation),

Appellant,

vs.

MOTORSHIP "HINDANGER", her tackle, engines, boilers, etc., and WESTFAL-LARSEN & Co. (a corporation),

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now appellants above-named and respectfully petition for a rehearing of the decision herein on the grounds herein stated.

Appellants respectfully petition for a rehearing in this proceeding for the reason that this court based its opinion on the assumption that the bill of lading was the contract between the parties, in spite of the fact there was no evidence from which its issuance by respondents or acceptance by appellants *as a contract* could be implied, and in the face of the fact that the evidence established that both appellants and respondents *believed* that the shipment was moving under an oral contract and the bill of lading was issued and accepted merely as a receipt. The decisions cited by appellants showing that such an assumption is contrary to the authorities apparently were overlooked by the court in rendering its opinion.

There was no conflict in the evidence as to the existence of some oral contract for the affreightment of these eggs. The only conflict was whether the contract was made by respondents with libelants or with one Walter Van Bokkelen. The evidence as to this is to be found in the testimony of Mr. Wintemute, vice-president in charge of traffic for General Steamship Corporation, the agent of respondents, and Mr. Lawler, manager of Poultry Producers of Central California.

Appellants concede that there is a conflict in the testimony of the two conversations held in March, 1930,—the first between Wintemute, representing the respondents, and Van Bokkelen, on March 8th; the second between Wintemute, representing the respondents, and Lawler, representing the libelants, on March 10th. This conflict is not, however, as to the fact of the consummation of an oral contract by those

negotiations. The sole conflict is as to whether the oral contract, admittedly consummated with someone, was between respondents and Van Bokkelen or between respondents and libelants. In our opening brief we summarized the testimony relating to these negotiations. To show that the entire probative force of this testimony was to demonstrate the making of an oral contract with someone, we will set out sufficient of the Apostles on Appeal to show the substance of the testimony, first, of Wintemute, and then of Lawler, with reference to these negotiations, Wintemute and Lawler being the only witnesses who testified with reference to these conversations.

In this connection we desire to point out that the testimony of Wintemute, quoted in the opinion of this court, to the effect that the conversations with Mr. Benjamin did not result in the booking of any cargo *at that time,*—to-wit: on or before February 15, 1930,— is not inconsistent with our position as to the content of the record, since we have never claimed that an oral contract was made prior to March, 1930. (See Brief for Appellants, page 29.)

Mr. Wintemute testified as follows:

> "A. On the morning of March 8th Mr. Walter Van Bokkelen arrived in San Francisco and called on me, stating that he had just come from the East by plane. I had been in telegraphic communication with him and wondered how he got here so soon. He told me that he was now prepared to ship 15,000 cases of eggs on the motorship 'Hindanger', that he wanted to give (254) us these eggs to carry out a promise made Mr. Von Erpecom, managing director of Messrs.

Westfal, Larsen & Company, made to Mr. Von Erpecom in London, at which time Mr. Van Bokkelen had discussed with Mr. Von Erpecom the possibility of Westfal, Larsen Company allocating to Mr. Van Bokkelen for operation in the Blavin line operated by Mr. Van Bokkelen between New York and Buenos Aires, the last two of the new ships then being built by Westfal, Larsen Company for the trade between the Pacific Coast and Argentine and Brazil. Mr. Van Bokkelen said he wanted to carry out his promise to Mr. Von Erpecom to give us a shipment of eggs, and accordingly he said he would ship 15,000 cases, that he was arranging with the egg people, the Pacific Egg Producers, to ship the eggs.

Q. *At that time, Mr. Wintemute, did you close a contract with Mr. Van Bokkelen or not?*

A. *Verbally, yes.*

Q. Did you agree on the rate?

A. Yes.

Q. What did you tell him the expected sailing of the 'Hindanger' from Puget Sound to San Francisco would be?

A. We told him that the ship, as near as we could figure then, was expected to sail from Seattle March 24, and from San Francisco, April 4.

Q. At the time you made this representation to Mr. Van Bokkelen, was the vessel in such a position that you could reasonably expect that the representations could be carried out?

A. Yes.

Q. Following the making of the contract with Mr. Van Bokkelen for the carriage of these eggs, did you have any communication with the Pacific Egg Producers?

A. Yes, on my instruction, Mr. Riali directed a letter to the Pacific Egg Producers, confirming the arrangement with Mr. Van Bokkelen and asking for their confirmation.

Q. Do you know whether Mr. Riali carried out your instructions and communicated with the Pacific Egg Producers?

A. I believe he did.

Q. Did you see the letter that was written?

A. I saw the copy (255).

Q. I will show you a letter dated March 12 and ask you if that is a copy of the letter written by Mr. Riali to the Pacific Egg Producers?

A. That is.

Q. Is that the letter that was written in accordance with your instructions, following the meeting with Mr. Van Bokkelen in which he had made the booking with you in which you asked them to confirm whether they would supply the eggs under the booking?

A. Yes."

(Page 297 et seq. of Apostles on Appeal.)

Mr. Lawler's testimony with reference to the conversation of March 10th with Mr. Wintemute was as follows:

"Q. What was stated in that conversation, Mr. Lawler?

A. I confirmed the space on the 'Hindanger' which had been arranged for on the Saturday previous by Mr. Van Bokkelen.

Q. What did you tell him?

A. I told him that we would ship from ten to fifteen thousand cases of eggs on the 'Hindanger'.

Q. Was the rate agreed upon?

A. The rate was agreed upon some time prior to that. I had no negotiations on the rate as far as I can remember.

Q. Had you been advised as to it?

A. Yes, I had; if I remember correctly I had a wire from New York that the rate had been agreed to.

Q. Were these eggs that were shipped shipped at that rate?

A. Yes.

Q. Did Mr. Wintemute accept the confirmation of the space?

A. Yes.

Q. At that time did you have in mind the statements that had been made in reference to the time of transit of this vessel?

A. In that respect I could give you the same information that has already been given to you by Mr. Rother.

Q. What did you have in mind?

A. About 35 days in transit. The boat had been somewhat delayed, if I remember correctly, it was somewhere around the first of April, that would bring it in—at least the first part of May.

Q. Did the information that you had as to the sailing date and the time of the voyage have anything to do with your confirmation of this space?

A. The time element was one of the most important elements in this whole thing.

Q. Mr. Lawler, did you make the contract for the shipment of these eggs on that date?

A. The contract with whom?

Q. With Westfal, Larsen & Company through the General Steamship Corporation?

A. The contract, or the arrangement was made with (229) Walter Van Bokkelen and he tele-

phoned that I had to confirm it with Mr. Wintemute.

Q. Did you confirm it?

A. Yes.

Q. And it was made on behalf of the Poultry Producers of Central California——

Mr. Graham. Do not lead the witness.

Mr. Sapiro. On whose behalf was that contract made?

A. I do not believe it was specifically made on behalf of the Poultry Producers or Pacific Egg Producers, but I think that being a commercial concern, that was not the worry of Mr. Wintemute particularly, whether I was taking it on behalf of the Poultry Producers of Central California, or the Pacific Egg Producers.

Q. Was there a definite amount agreed upon?

A. The amount was left open, between ten thousand and fifteen thousand cases, because it was doubtful whether or not the Washington Cooperative would be able at that time to go through with their part of it. That is the reason why there was a minimum of ten thousand and a maximum of fifteen thousand arranged for.

Q. Was the 10,000 minimum guaranteed?

A. Yes, the 10,000 minimum was guaranteed because our association, the Poultry Producers of Central California, could ship that many without any assistance from the Washington Cooperative.

Q. Was it agreed in that conversation that you would give them at least ten thousand?

A. Yes.

Q. You did ship eleven thousand, as a matter of fact?

A. Yes.

Q. Now the conversation that you had on that date when the confirmation was made, was that in reference to this shipment on the 'Hindanger'?

A. Yes.

Q. It referred to the shipment that subsequently went out?

A. Yes."

(262-264, Apostles on Appeal.)

Comparing these two conversations, it is obvious that the only witnesses testifying as to the negotiations on the 8th and 10th of March testified that an oral contract resulted, Wintemute testifying expressly that on March 8th he closed a contract verbally with Van Bokkelen for the shipment of these very eggs to be furnished by appellants under that contract, and Lawler testifying positively that on the 10th he agreed to ship from 10,000 to 15,000 cases of eggs at the rate previously agreed upon and that Wintemute accepted this confirmation of space. Thus the sole conflict in the evidence is as to the party with whom the respondents' oral contract for the transportation of the eggs here in suit was made.

In stating that "the record conclusively establishes that appellants were both the owners and shippers of the eggs in question", the opinion of this court impliedly rejects as inherently unbelievable the testimony of Wintemute that Van Bokkelen was the real shipper and that libelants merely agreed to furnish the eggs under Van Bokkelen's contract. We respectfully submit that this does not, however, answer the question of law raised by our appeal, to-wit: whether when all the testimony showed that the bill of lading

was issued and accepted by parties who believed that it was issued and accepted merely as a receipt and document of title given pursuant to a prior complete oral contract of affreightment, the bill of lading could, as a matter of law, determine the rights of the parties.

At pages 16 to 27 of the Brief for Appellants we analyzed authoritative cases showing that the existence of an oral contract for the transportation of these eggs with either appellants or a third person would prevent the bill of lading being accepted as the contract of the parties, or as anything other than a receipt and document of title. We will not repeat the analysis of the following cases contained in our brief.

Northern Pacific R. Co. v. American Trading Co., 195 U. S. 439, 25 S. Ct. Rep. 84;
Bostwick v. B. & O. R. Co., 45 N. Y. 712;
Mar Meditteraneo, 1 F. (2d) 459;
Isle de Sumatra, 286 Fed. 436;
Julia Luckenbach, 1923 A. M. C. 479;
Arctic Bird, 109 Fed. 167;
Citta di Palermo, 153 Fed. 378;
Burns v. Burns, 131 Fed. 238;
Thompson on Bills of Lading.

These authorities all rest upon the proposition that to constitute a contract the bill of lading must be accepted as such, expressly or impliedly, and such a bill of lading is held not to have been accepted as a contract in cases where the goods were delivered to the vessel pursuant to a prior oral contract of affreightment in the absence of some express showing that it was so accepted. There is not one word of testimony in this case showing any intention to supersede, by the

bills of lading as a contract, the oral contract pursuant to which these goods were delivered to the ship.

The opinion of this court fails to consider any of the authorities cited, although they include a decision of the United States Supreme Court and earlier decisions of this court. The opinion simply assumes that if there was evidence to sustain the Master's finding that no oral contract was made between these parties, because there was no meeting of the minds, then the bills of lading determined the rights of the parties as a matter of law. Such a holding is contrary in principle to the controlling authorities cited by us.

To hold that no oral contract was proved in this case not only ignores the positive testimony that the negotiations of March 8th and March 10th resulted in a contract with someone, but also decides the case upon a different factual premise than that conceded by both parties at the trial of the action and upon brief. We have heretofore set forth at page 22 of our brief on appeal respondents' theory at the trial that an oral contract with Van Bokkelen resulted from the negotiations of March 8th and March 10th. It has, of course, been appellants' position at all times that these negotiations resulted in an oral contract between libelants and respondents. To now hold that the negotiations of March 8th and 10th resulted in no oral contract with anyone is to decide the appeal on a different factual premise than that assumed by all parties to exist at the trial of the action. This is contrary to law.

Brown v. Gurney, 201 U. S. 184, 26 S. Ct. Rep. 509;

U. S. S. B. E. F. Corp. v. South Atlantic Dry-dock Co., 19 F. (2d) 486;

U. S. v. Leerburger (C. C. A. 8th), 160 Fed. 651.

However, even if this court should consider that no actual contract resulted from the negotiations of March 8th and 10th, there is still no room for a finding that the bill of lading determines the rights of the parties unless the very foundation of the cases analyzed by us is swept aside; namely, that to determine the rights of the parties the bill of lading must be accepted, expressly or impliedly, as the contract. At no time have respondents suggested any authority which would support the proposition that when both shipper and carrier believed that the bill of lading was issued only as a receipt and document of title under a preexisting complete oral contract, it nevertheless determines the rights of the parties. Yet this is the very rule of law made by this decision without citation of authorities. We respectfully submit that it is a radical departure from the principle established by the cases upon which we rely, and that on reconsideration upon this petition it should be reversed.

Dated, San Francisco,
April 12, 1935.

Respectfully submitted,

CARL R. SCHULZ,
MILTON D. SAPIRO,
Counsel for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
April 12, 1935.

CARL R. SCHULZ,
Of Counsel for Appellants and Petitioners.

NO. 7296

United States
Circuit Court of Appeals
For the Ninth Circuit

TONG JEUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

THE RECORDER PTG. & PUB. CO., 99 VAN NESS AVE. SOUTH, S. F.

NO. 7296

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the Southern Division of the United States
District Court, Northern District
of California

No. 24280-S

UNITED STATES OF AMERICA

vs.

TONG JEUNG

NAMES OF ATTORNEYS:

For Defendant and Appellant:

STEPHEN M. WHITE, Esq.,
576 Sacramento St., San Francisco, Calif.

For Plaintiff and Appellee:

UNITED STATES ATTORNEY,
San Francisco, Calif.

The United States of America,
Northern District of California, ss.

THE UNITED STATES

vs.

TONG JEUNG

COMPLAINT FOR VIOLATION OF
Section.....R. S.

Before me, the undersigned, a robt. h. voss for the Northern of Calif, personally appeared this day 30th, who, on oath, deposes and says that TONG JEUNG, on or about the 30 day of Sept., 1932, at San Francisco in the Northern District of Calif, did unlawfully, was and is a Chinese person unlawfully in the United States contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And furthermore the said deponent says he has reason to believe and does believe that..... are material witnesses to the subject-matter of this complaint.

ROBERT H. VOSS

Subscribed and sworn to before me this 30th day of September, 1932

FRANK O. NEBEKER
U. S. Commissioner

[Endorsed]: Filed 9—30, 1932. Frank O. Nebeker, U. S. Commissioner. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

The United States of America
Northern District of California, ss.

No. 1289

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TONG JEUNG

Defendant.

JUDGMENT AND ORDER OF DEPORTATION

WHEREAS, TONG JEUNG stands charged on the oath of ROBERT H. VOSS, Inspector, U. S. Immigration Service, before me, FRANK O. NEBEKER, a United States Commissioner in and for the Northern District of California, as follows, to-wit: That within the jurisdiction of the United States aforesaid, and within the Northern District of California, and after the passage by the Congress of the United States of an act entitled, "An Act to Amend an Act entitled "An Act to execute certain treaty stipulations relating to Chinese' approved May 6, 1882, and the acts amendatory thereof and supplemental thereto," the said TONG JEUNG did come into the United States from a foreign place, and having come, has remained within the United States; that the said TONG JEUNG has been found and now is unlawfully within the United States, and that at all times hereinafter mentioned the said TONG JEUNG is and was a Chinese laborer and a Chinese person, and a person of Chinese descent; and whereas, the said

TONG JEUNG was duly apprehended upon said charge in the aforesaid Northern District of California, and whereas, an examination was thereupon had before me of said TONG JEUNG upon the said charge on the 13th day of October, 1932, at which he was fully informed of his rights and given an opportunity to present evidence, and whereupon STEPHEN M. WHITE [2] attorney and counselor-at-law, appeared for the said TONG JEUNG, at his request, and from the evidence produced before me, it appearing that the said TONG JEUNG is by race, language and color a Chinese person and a person of Chinese descent and a laborer by occupation; and whereas, the said TONG JEUNG has failed to show by any affirmative proof to my satisfaction, his lawful right to remain in the United States; and it appearing to me that said TONG JEUNG has been given a sufficient opportunity to produce evidence and witnesses to show his right to remain in the United States; and whereas, the said TONG JEUNG has not made it appear to me that he is a subject or citizen of any other country than China, and it appears that he is a Chinese laborer and is a subject of the Republic of China, and is not registered and not a member of the exempt class of Chinese persons provided for in and by said Act of Congress.

NOW, THEREFORE, I hereby order and adjudge the said TONG JEUNG to be immediately removed from the United States, to the Republic of China, and I order that said removal and deportation of said TONG JEUNG be made from the Port of San Francisco, within the limits of the

Northern District of California, and I further order that said TONG JEUNG be, and he hereby is committed to the custody of the United States Marshal for the Northern District of California, for the purpose aforesaid, and that until such time as this judgment can be executed said TONG JEUNG shall be detained in the County Jail of the County of San Francisco, in the Northern District of California, at San Francisco, in said District, and in such other jails within the United States as it may become necessary for the Marshal or his deputies to leave the defendant during the execution of this judgment for safekeeping; and a certified copy of this judgment shall be the process upon which said TONG JEUNG [3] TONG JEUNG shall be conveyed to and detained in said jails, and the keepers of said jails shall receive him and detain him therein and a certified copy of this judgment shall be the process upon which said removal of said TONG JEUNG shall be made from the United States to the Republic of China.

And said process shall be executed by Fred L. Esola, United States Marshal for said District, or such of his deputies as he may designate for that purpose.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and fixed my seal on the 7th day of December 1932.

[Seal] FRANK O. NEBEKER,
United States Commissioner

(Picture of Tong Jeung pasted on original copy)

[Endorsed] Filed Dec 8, 1932 10:51 AM [4]

In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 24280-S

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TONG JEUNG,

Defendant.

NOTICE OF APPEAL.

To United States of America, Plaintiff, to George J. Hatfield, United States Attorney for the Northern District of California, the attorney for Plaintiff, and to Honorable Frank O. Nebeker, United States Commissioner in and for the Southern Division of the United States District Court for the Northern District of California:

You and each of you will please take notice that Tong Jeung, the defendant herein, hereby appeals to the Judge of the United States District Court, in and for the Southern Division of the Northern District of California, and to the United States District Court, in and for the Southern Division of the Northern District of California, from the order and judgment of deportation rendered in the above entitled action by Honorable Frank O. Nebeker, United States Commissioner in and for the Southern Division of the United States District Court for the Northern District of California, on the ground that there was no jurisdiction over the person of

the defendant and the subject matter of the proceedings in the said United States Commissioner.

Dated this 6th. day of December, 1932.

TONG JEUNG
Defendant.

STEPHEN M. WHITE
Attorney for Defendant.

[Endorsed]: Filed Dec 6, 1932 [5]

[Title of Court and Cause.]

STIPULATION OF FACTS

IT IS HEREBY STIPULATED by and between the parties to the above entitled action, through their respective counsel, that the following facts may be deemed to be established and proven for all purpose of the trial of said action subject to defendant's objection hereby made that the court has no jurisdiction of the person or of the cause:

I.

That Tong Jeung, defendant and appellant herein, is a person of Chinese race and descent.

II.

That said defendant and appellant is a native and citizen of the Republic of China.

III.

That said defendant and appellant is a laborer.

IV.

That said defendant and appellant has no certificate of residence issued under the Chinese Exclusion Acts.

V.

That said defendant and appellant has no [6] certificate issued under Section 6 of the Chinese Exclusion Act of May 6, 1882, as amended by the Act of July 5, 1884. (8 USCA Sec. 265).

VI.

That said defendant and appellant came to the United States from China fourteen or fifteen years ago as a seaman on the steamer "Nanking".

VII.

That said defendant and appellant has never been admitted into the United States by any officer thereof.

VIII.

That neither parent of said defendant and appellant has ever been in the United States.

IX.

That on September 30, 1932, said defendant and appellant was found in San Francisco by Robert H. Voss, a duly qualified, competent and acting Immigrant Inspector of the United States and was thereupon examined under oath by said Voss.

X.

That in answer to questions then and there propounded to him by said Immigrant Inspector Voss said defendant and appellant then and there testi-

fied to the facts stipulated in paragraphs I to VIII hereof.

XI.

That thereafter and on September 30, 1932, said defendant and appellant was taken by said Immigrant Inspector Voss before Frank O. Nebeker, United States Commissioner for the Southern Division of the Northern District of California and that said Immigrant Inspector Voss then and there filed before said United States [7] Commissioner his sworn complaint in the above entitled matter.

XII.

That prior to the filing of said complaint by Immigrant Inspector Voss, as aforesaid, no warrant for the arrest of defendant and appellant had been issued.

XIII.

That upon the filing of said complaint before United States Commissioner Frank O. Nebeker by Immigrant Inspector Voss said United States Commissioner issued a warrant of arrest for defendant and appellant.

XIV.

That said warrant of arrest was thereupon on September 30, 1932, served upon said defendant and appellant by a United States Deputy Marshal.

XV.

That on October 13, 1932, a hearing was held before United States Commissioner Frank O. Nebeker as a result of which hearing said United States Commissioner duly made and entered his judgment

and order that defendant and appellant be deported to China.

XVI.

That at said hearing Stephen M. White, Attorney for defendant and appellant objected to the proceedings before the United States Commissioner on the grounds that the Commissioner did not have jurisdiction of the person of the defendant nor of the subject matter of the proceeding.

Dated: January 2, 1933.

STEPHEN M. WHITE
Attorney for Defendant and Appellant

I. M. PECKHAM
United States Attorney
Attorney for Plaintiff and Appellee.

[Endorsed]: Filed Jan 9, 1933 2:28 PM [8]

In the Southern Division of the United States District Court for the Northern District of California.

No. 24280-S

UNITED STATES OF AMERICA,
Plaintiff and Appellee

vs.

TONG JEUNG,
Defendant and Appellant.

JUDGMENT AND ORDER OF DEPORTATION

The above entitled cause came on regularly for hearing on the 31st day of May, 1933, on appeal

from an order of deportation theretofore duly made and entered by Frank O. Nebeker, United States Commissioner for the Northern District of California; and said appeal was on said date submitted for the decision of the Court on a Stipulation of Facts and Briefs filed by the respective parties; and, it appearing that said defendant and appellant, TONG JEUNG, stands charged before this Court on the oath of Robert H. Voss, Inspector, U. S. Immigration Service, taken before Frank O. Nebeker, a United States Commissioner in and for the Northern District of California, as follows, to-wit: That within the jurisdiction of the United States aforesaid, and within the Northern District of California, and after the passage by the Congress of the United States of an act entitled, "An Act to Amend an Act entitled 'An Act to execute certain treaty stipulations relating to Chinese' approved May 6, 1882, and the acts amendatory thereof and supplemental thereto," the said defendant and appellant did come into the United States from a foreign place, and having come, has remained within the United States; that the said defendant and appellant has been found and now is unlawfully within the United States, and that at all times hereinafter mentioned the said defendant and appellant is and was a laborer and a Chinese person, and a person of Chinese descent; and it appearing that the said defendant and appellant was duly apprehended upon said charge in the aforesaid [9] Northern District of California, and it appearing

that an examination and hearing was thereupon had before said United States Commissioner upon the said charge and said United States Commissioner thereupon made and entered his order of deportation as aforesaid, said defendant and appellant, TONG JEUNG, appearing at the hearing on appeal from said order of deportation by his counsel Stephen M. White, and the plaintiff and appellee appearing by I. M. Peckham, United States Attorney, and evidence having been introduced and the cause argued and submitted for decision;

And from the evidence produced before this court *is* appears and the court finds that the said defendant and appellant, TONG JEUNG, is a Chinese person and a person of Chinese descent and a laborer; and it appearing and this Court finds that said defendant and appellant has failed to show by any affirmative proof to the satisfaction of this court his lawful right to remain in the United States; and it appearing and this court finds that said defendant and appellant has been given sufficient opportunity to produce evidence and witnesses to show his right to remain in the United States, and has not made it appear to this court that he is a subject or citizen of any other country than China, and it appears and this Court finds that he is a Chinese laborer and is a subject of the Republic of China, and is not registered and is not a member of the exempt class of Chinese persons provided for in and by said Act of Congress;

NOW, THEREFORE, It is hereby ordered, adjudged and decreed that the said defendant and appellant, TONG JEUNG, be immediately removed from the United States to the Republic of China, and that said removal and deportation of said defendant and appellant be made from the Port of San Francisco, within the limits of the Northern District of California, and it is further ordered that said defendant and appellant be, and he hereby is committed to the custody of the United [10] States Marshal for the Northern District of California, for the purpose aforesaid, and that until such time as this judgment can be executed said defendant and appellant shall be detained in the County Jail of the County of San Francisco, in Northern District of California, at San Francisco, in said District, and in such other jails within the United States as it may become necessary for the Marshal or his deputies to leave the defendant and appellant during the execution of this judgment for safekeeping; and a certified copy of this judgment shall be the process upon which said defendant and appellant shall be conveyed to and detained in said jails, and the keepers of said jails shall receive him and detain him therein, and a certified copy of this judgment shall be the process upon which said removal of said defendant and appellant shall be made from the United States to the Republic of China.

And said process shall be executed by Fred L. Esola, United States Marshal for said District, or

such of his deputies as he may designate for that purpose.

Dated: This 5th day of July, 1933.

A. F. ST. SURE
United States District Judge.

(PICTURE OF THE CHINAMAN (TONG JEUNG) ATTACHED TO THE ORIGINAL COPY.)

[Endorsed]: Entered in Vol 29 Judg. and Decrees at Page 62-63. Filed Jul 5, 1933 1:52 P.M. [11]

[Title of Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above-entitled Court, to United States of America, the appellee and plaintiff, and to Henry H. McPike, Esq., United States Attorney, attorney for appellee and plaintiff:—

You and each of you will please take notice that Tong Jeung, the appellant and defendant in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered herein on July 5th, 1933, in favor of appellee and plaintiff and against appellant and defendant.

Dated this 15th. day of July, 1933.

STEPHEN M. WHITE,
Attorney for Appellant and Defendant. [12]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Tong Jeung, the appellant and defendant in the above-entitled matter, and respectfully shows:——

That on the 5th. day of July, 1933, the above-entitled Court made and entered its order and judgment in favor of appellee and plaintiff and against appellant and defendant, in which said order in the above-entitled cause certain *erros* were made to the prejudice of the appellant and defendant herein, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore the appellant and defendant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors as complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof, and further, that the said appellant and defendant be held within the jurisdiction of this Court during the pendency of the appeal herein, and that meanwhile all further proceedings in this case be suspended, stayed and superceded until the final determination of said appeal and that said appellant and defendant be admitted to bail in the sum of $2,500.00.

Dated this 15th. day of July, 1933.

STEPHEN M. WHITE,
Attorney for Appellant and Defendant. [13]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the defendant and appellant in the above-entitled cause by his attorney and specifies the following as the errors upon which he will rely and which he will urge upon the appeal in the above entitled matter, to-wit:——

-I-

That the Court erred in not holding that it had no jurisdiction over the person of the appellant and defendant and the subject matter of the proceedings.

-II-

That the Court erred in not holding that the taking of the appellant and defendant by Immigration Inspector Voss before Frank O. Nebeker, United States Commissioner for the Southern Division of the Northern District of California, before a warrant of arrest had been issued for the said appellant and defendant, was illegal.

-III-

That the Court erred in not holding that the appellant and defendant was illegally arrested by Immigrant Inspector Voss.

-IV-

That the Court erred in holding that the appellant and defendant was subject to deportation to China. [14]

WHEREFORE, the defendant and appellant, through his attorney, prays that the order and

judgment against the defendant and appellant adjudging him to be one not entitled to be or remain in the United States and directing his removal and deportation from the United States to China be reversed and for such other and further relief as the Court may deem meet and proper.

Dated this 15th. day of July, 1933.

STEPHEN M. WHITE,
Attorney for Defendant and Appellant.

[Endorsed]: Filed Jul 15, 1933 11:19 A.M. [15]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It appearing to the above-entitled Court that Tong Jeung, the appellant and defendant herein, has this day filed and presented to the above Court his petition praying for an order of this Court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order of this Court in favor of appellee and plaintiff and against defendant and appellant, and good cause appearing therefor, - - -

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled Court make and prepare a transcript of all the papers, proceedings and records in the above-entitled matter and transmit the same to the United States Circuit Court of

Appeals for the Ninth Circuit within the time allowed by law; and

IT IS FURTHER HEREBY ORDERED that the execution of the order and judgment and all further proceedings in this case be suspended, stayed and superceded pending this appeal and that the appellant and defendant be enlarged on bond in the amount of $2,500.00, pending this appeal and until further orders herein.

Dated this 15th. day of July, 1933.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Jul 15, 1933 11:19 A.M. [16]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of Said Court:

Sir:

Please issue copies of following papers for transcript on appeal:

1. Complaint filed before U. S. Commissioner Frank O. Neberker.
2. Judgment and Order of Deportation of U. S. Commission Frank O. Nebeker.
3. Notice of Appeal from judgment and order of deportation of U. S. Commissioner Frank O. Nebeker to United States District Court.
4. Stipulation of Facts.

5. Judgment and Order of Deportation of U. S. District Judge.
6. Notice of Appeal
7. Petition for Appeal.
8. Assignment of Errors
9. Order allowing Appeal
10. Citation on Appeal.
11. Praecipe.

STEPHEN M. WHITE
Attorney for Appellant and Defendant.

[Endorsed]: Filed Sep 25 1933 [17]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 17 pages, numbered from 1 to 17, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of America vs. Tong Jeung, No. 24280S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Four Dollars and Fifty Cents ($4.50) and that the said amount has been paid to me by the Attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of September A. D. 1933.

[Seal] WALTER B. MALING
Clerk.
By C. M. TAYLOR
Deputy Clerk. [18]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss

The President of the United States, to United States of America, the Appellee and plaintiff, and to Henry H. McPike, Esq., United States Attorney, attorney for appellee and plaintiff, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Tong Jeung, is appellant and defendant and you are appellee and plaintiff, to show cause, if any there be why the decree rendered against the said appellant and defendant, as in the said order allowing appeal mentioned,

should not be corrected, and why speedy justice should not be done to the party in that behalf.

Dated at San Francisco, California, this 15th. day of July, 1933.

A. F. ST. SURE.
United States District Judge.

[Endorsed]: Filed Jul 15 1933 11:18 AM [19]

[Endorsed]: Transcript of Record. Filed September 26, 1933. Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7302

United States

Circuit Court of Appeals

For the Ninth Circuit.

DANG NAM,

Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Parker Printing Company, 145 Fremont Street, San Francisco.

No. 7302

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Parker Printing Company, 545 Sansome Street, San Francisco.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Petitioner, DANG NAM

E. J. BOTTS, ESQ.,

Stangenwald Building, Honolulu, T. H.

For the Respondent, JAMES B. BRYAN,

District Director of Immigration,

Port of Honolulu, Territory of Hawaii.

SANFORD B. D. WOOD, ESQ.,

United States Attorney,

Federal Building, Honolulu,

Territory of Hawaii.

JOHN ALBERT MATTHEWMAN, ESQ.,

Assistant United States Attorney,

Federal Building, Honolulu,

Territory of Hawaii. [1*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the United States District Court for the Territory of Hawaii

H. C. No. 252

In the Matter of the Application of
DANG NAM
for a Writ of Habeas Corpus.

CLERK'S STATEMENT

Time of Commencing Suit:
October 3, 1932 Petition filed
Names of Original Parties:
Dang Nam, Petitioner
James B. Bryan, Esq., Director of Immigration for the Port of Honolulu, Territory of Hawaii, Respondent
Dates of Filing Pleadings
October 3, 1932 Petition
Writ of Habeas Corpus Issued
October 17, 1932 Return to Writ of Habeas Corpus
October 28, 1932 Traverse to Return
Date of Filing Decision and Judgment:
December 1, 1932 Decision
December 3, 1932 Judgment
Times When Proceedings Were Had:
October 7, 1932 Continuance
November 22, 1932 Continuance
November 23, 1932 Trial
November 25, 1932 Further Trial [2]

Proceedings in the Above Entitled Matter were had before the Honorable EDWARD K. MASSEE, District Judge.

Dates of Filing Appeal Documents:

Petition for Appeal	December 21, 1932
Assignment of Errors	December 21, 1932
Order Allowing Appeal	December 21, 1932
Citation on Appeal issued	December 21, 1932
Cost Bond	December 24, 1932
Praecipe for Transcript	December 22, 1932

CERTIFICATE OF CLERK AS TO THE ABOVE STATEMENT

The United States of America,
Territory of Hawaii.—ss.

I, WM. F. THOMPSON, JR., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the names of the original parties, the several dates when the respective pleadings were filed; the time when proceedings were had and the name of the Judge presiding; the date of the filing of the decision and judgment and date when appeal documents were filed and issued in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of February A. D. 1933.

[Seal] WM. F. THOMPSON, JR.
Clerk, U. S. District Court,
Territory of Hawaii. [3]

[Title of Court and Cause.]

PETITION

To the Honorable, the Presiding Judge in the Above Entitled Court:

The petition of DANG NAM, above named, for a writ of habeas corpus, respectfully shows and presents:

I.

That at all times herein mentioned, James B. Bryan has been and still is the duly appointed and acting District Director of Immigration in and for the District and Territory of Hawaii.

II.

That petitioner is a member of the Chinese race and is now and has been for thirty-six years last past a resident of the Territory of Hawaii engaged in business and maintaining a home at Wailuku, Island of Maui.

III.

That on or about the 24th day of January, 1932, petitioner was arrested for a narcotic violation and thereafter, towit the 12th day of February, 1932, the said petitioner was indicted by the United States Grand Jury in and for the District and Territory of Hawaii upon said alleged offense, a copy of which said indictment is hereto annexed and made a part hereof and marked Exhibit "A". [5]

IV.

That thereafter and on towit, the 18th day of April, 1932, the petitioner entered a plea of guilty

to the said indictment before the Honorable E. K. Massee, Judge of the United States District Court in and for the District and Territory of Hawaii, and the said Judge at said time sentenced the petitioner to Imprisonment in the City and County Jail in Honolulu for a term of six months on the second count of said indictment and placed petitioner on probation for a period of three years on the first count of said indictment.

V.

That the plea of guilty entered, as aforesaid, by the petitioner was made pursuant to an arrangement or stipulation with a representative of the United States District Attorney's Office that a recommendation be made by said office to the Court against the deportation of petitioner and conformable to said understanding or stipulation, Willson C. Moore, Esquire, a member of the staff of the United States District Attorney's office, made such recommendation to the Court and the Honorable E. K. Massee, Judge of said Court aforesaid, at the time of imposing sentence recommended and directed, as authorized and provided in Section 155, Title VIII, United States Code, that petitioner be not deported.

VI.

That thereafter, towit, on the 2nd day of May, 1932, a mittimus issued pursuant to the sentence of the court, aforesaid, and the petitioner was committed to and lodged in the City and County Jail

where he has since remained in the execution of the sentence aforesaid. [6]

VII.

That notwithstanding the order and recommendation against deportation, as aforesaid, the Secretary of Labor did, on or about the 29th day of June, 1932, issue a warrant looking to the deportation of the said petitioner because of his sentence, as aforesaid, on said indictment and thereafter did, on the .....day of September, 1932, order and direct James B. Bryan, Esquire, District Director of Immigration at the Port of Honolulu, to deport petitioner upon the expiration of said *said* sentence in the City and County Jail, imposed upon him as aforesaid, and the said James B. Bryan, Esquire, will, unless restrained and prevented by this Honorable Court, deport the said petitioner.

VIII.

That your petitioner is now imprisoned and restrained of his liberty in the Detention Quarters of the Immigration Station, Honolulu aforesaid, by the said James B. Bryan, Esquire, for the purpose of deporting petitioner to the Republic of China.

IX.

That petitioner is not being held or restrained of his liberty under any order, judgment or process of any court, nor is he being held or restrained of his liberty otherwise than as above set forth.

WHEREFORE, TO BE RELIEVED OF SAID UNLAWFUL IMPRISONMENT AND THREATENED DEPORTATION, petitioner prays that a writ of habeas corpus issue herein directed to the said James B. Bryan, Esquire, Immigration Director as aforesaid, ordering and directing him to have and produce the body of petitioner before this Honorable Court, to do, submit to and receive what the law may require in the premises.

Dated at Honolulu, this 3rd day of October, A. D. 1932.

(s) DANG NAM
Petitioner [7]

United States of America.
Territory of Hawaii.—ss.

Dang Nam being first duly sworn, on oath, deposes and says: That he is the petitioner above named; that he has heard read and explained to him the foregoing Petition and knows the contents thereof and that the same is true.

(s) DANG NAM

Subscribed and sworn to before me this 3rd day of October, 1932.

[Seal] (s) GLADYS K. BENT.
Notary Public, First Judicial Circuit, Territory of Hawaii. [8]

EXHIBIT "A"

In the United States District Court for the Territory of Hawaii.

October Term 1931

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANG NAM,

Defendant.

INDICTMENT.

Count I.

Violation of the Act of February 9, 1909, as amended by the Act approved January 17, 1914, as amended by the Act approved May 26, 1922 and known as THE NARCOTIC DRUGS IMPORT AND EXPORT ACT.

Count II.

Violation of Section 1 of the Act approved December 17, 1914, as amended by Section 1006 of the Revenue Act of 1918, reenacted by Section 1005 of the Revenue Act of 1921.

A TRUE BILL.

(Sgd) CLIFFORD KIMBALL,
Foreman.

(Sgd) SANFORD B. D. WOOD,
Sanford B. D. Wood,
United States Attorney,
District of Hawaii.

I hereby order a Bench Warrant to issue forthwith on the within indictment for the arrest of the defendant therein named, bail hereby being fixed at $.....

.....

Judge, U. S. District Court,
Territory of Hawaii. [9]

In the United States District Court
for the Territory of Hawaii.
October Term 1931.

The United States of America,
District of Hawaii.—ss.

Count I.

The Grand Jurors of the United States, empaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oaths, present that:

DANG NAM

on or about the 24th day of January, 1932, at Wailuku, Island of Maui, and within the said district and within the jurisdiction of this Court, did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit:

290 grains

of smoking opium and opium prepared for smoking, which said narcotic drug as he, the said

DANG NAM,

then and there well knew had been theretofore imported and brought into the United States contrary to law and to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count II.

And the Grand Jurors aforesaid, upon their oaths, aforesaid, further present, that heretofore, to wit: On the 24th day of January, 1932, at Wailuku, Island of Maui, and within the district aforesaid and within the jurisdiction of this court,

DANG NAM, [10]

the identical person named in the first count of this indictment, did knowingly, unlawfully, fraudulently, and feloniously purchase, sell, dispense, and distribute

290 grains

of smoking opium and opium prepared for smoking from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium and opium prepared for smoking then and there was a compound, manufacture, salt, derivative, and preparation of opium and was so purchased, sold, dispensed, and distributed by the said

DANG NAM,

as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd) SANFORD B. D. WOOD,
Sanford B. D. Wood,
United States Attorney,
District of Hawaii.

[Endorsed]: Filed Oct. 3, 1932. Wm. F. Thompson, Jr., Clerk. [11]

[Title of Court and Cause.]

WRIT OF HABEAS CORPUS.

The President of the United States of America.

To: JAMES B. BRYAN, ESQUIRE, United States Immigration Inspector in Charge, at the Port of Honolulu, Territory of Hawaii:

We command you that the body of DANG NAM by you detained and imprisoned, as is charged, you have before our District Court of the United States in and for the District and Territory of Hawaii, on Friday, the 7th day of October, A. D. 1932, at the hour of 2 o'clock in the afternoon of said day, together with the cause of the detention of the said DANG NAM, to then and there undergo and receive what our said Court shall consider concerning him in this behalf, and have you then and there this writ with your doings thereon, and you OSCAR COX, ESQUIRE, United States Marshal in and for the District and Territory of Hawaii, or your deputy, are hereby directed and commanded to forthwith serve this writ.

WITNESS the HONORABLE E. K. MASSEE, Judge of the United States District Court in and for the District and Territory of Hawaii, this 3d day of October, A. D. 1932.

WM. F. THOMPSON, JR.,
Clerk, United States District Court in and for the District and Territory of Hawaii.
By (s) E. Langwith, Deputy Clerk.

Let the foregoing writ of Habeas Corpus issue.

(s) EDWARD K. MASSEE,
Judge, United States District Court, in and for the District of Hawaii.

Bond $2,000.00

(s) E. K. MASSEE, Judge. [13]

United States Marshal's Return,

The within Writ of Habeas Corpus was received by me on the 3rd day of October A. D. 1932 and is returned executed this 3rd day of October A. D. 1932 by exhibiting the Original Writ of Habeas Corpus and by handing to and leaving with James B. Bryan, U. S. Immigration Inspector, Port of Honolulu, Territory of Hawaii, a certified copy of the within Writ of Habeas Corpus and Petition.

Dated at Honolulu, T. H. this 3rd day of October A. D. 1932.

OSCAR P. COX
United States Marshal.
By (s) Louis K. Kahanamoku,
Deputy U. S. Marshal.

Marshal's Civ. Docket.
No. 1890
Court No. H. C. 252

Fees	$2.00
Expenses	
Total	$2.00 [14]

[Title of Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS

Now comes James B. Bryan, respondent in response to a writ of habeas corpus issued in the above entitled matter on October 3, 1932, commanding the respondent to produce before the court the body of Dang Nam and show cause for the detention of the said Dang Nam and herewith produces before the court the body of the said Dang Nam and hereby shows cause for his detention, alleging as follows:

I.

That the respondent is—and from February 16, 1932, has been—the District Director of Immigration of the Bureau of Immigration of the United States Department of Labor, at the Port of Honolulu, Territory of Hawaii:

II.

That on April 18, 1932, the petitioner, the said Dang Nam, an alien—who is not an addict who is not a dealer in, or peddler of, any of the narcotic drugs hereinafter mentioned in this paragraph—was convicted and sentenced in the United States District Court for the Territory of Hawaii for the violation of a "statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of [16] opium, coca leaves, heroin, or any salt,

derivative, or preparation of opium, coca leaves", as more specifically appears in paragraphs III and IV and Exhibit A of the petition herein filed by the petitioner:

III.

That the Secretary of Labor—pursuant to the obligations of his office, particularly the Act of Congress of February 18, 1931, entitled "An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics" (8 U. S. C., section 156a)—on June 29, 1932, issued a warrant for the arrest of the petitioner, looking to his deportation because of the conviction and sentence mentioned in paragraph II hereof, and thereupon the petitioner was arrested under the said warrant and held for a hearing on the propriety of deporting him:

IV.

That, on July 18, 1932, the said hearing was instituted, but, to enable the petitioner to be represented by counsel, was continued until August 12, 1932, at which time, the petitioner then being represented by counsel, a full hearing was had:

V.

That, on August 19, 1932, Charles B. Borella, the immigrant inspector conducting the said hearing, made his report on the same and therein recommended that the petitioner be deported to China:

VI.

That the Secretary of Labor, thereupon, on September 26, 1932, issued a warrant for the deportation of the petitioner, and, pursuant to the same, the respondent [17] was about to deport the petitioner when restrained from so doing by the order of this court.

WHEREFORE, upon the foregoing return to the writ of habeas corpus, it is respectfully submitted that the petitioner be remanded to the custody of the respondent for deportation as ordered by the Secretary of Labor.

(s) JAMES B. BRYAN,
JAMES B. BRYAN,
District Director of Immigration, Port of Honolulu, Territory of Hawaii.

Honolulu, Hawaii
October ....., 1932
SANFORD B. D. WOOD
United States Attorney
(s) JOHN ALBERT MATTHEWMAN
JOHN ALBERT MATTHEWMAN
First Assistant U. S. Attorney [18]

The United States of America
Territory of Hawaii

James B. Bryan, under oath, deposes and says:

That he is the District Director of Immigration of the Bureau of Immigration of the United States Department of Labor, at the Port of Honolulu, Territory of Hawaii, and in that capacity made and signed the foregoing Return to Writ of Habeas

Corpus; and that all the allegations contained in the said return are true.

(s) JAMES B. BRYAN.

Subscribed and sworn to, before me, this 17th day of October, 1932.

(Seal) (s) WM. F. THOMPSON, JR.
Clerk, of the United States District for the Territory of Hawaii.

[Endorsed]: Filed Oct. 17, 1932. Wm. F. Thompson, Jr., Clerk. By Thos. P. Cummins, Deputy Clerk. [19]

[Title of Court and Cause.]

TRAVERSE TO RETURN.

Comes now DANG NAM, petitioner above named, and for traverse to the return of the respondent in the above entitled matter alleges, admits and denies as follows, towit:

I.

Admits the allegations in Paragraph I of said return and for answer to Paragraph 2 of said return says as follows: That he is a Chinese alien addicted to the use of opium and admits that on April 18, 1932, he pleaded guilty and was sentenced in the United States District Court for the Territory of Hawaii for a violation of the Act of December 17, 1914, as amended, and upon entering said plea was sentenced to a term of six months imprisonment in the City and County Jail, all of

which is more fully set forth in Paragraphs 3, 4, 5 and 6 of Petitioner's Petition herein, which is hereby referred to and made a part hereof by this reference.

II.

Admits that the Secretary of Labor, on or about the 29th day of June, 1932, issued a warrant for the arrest of petitioner looking to his deportation because of his plea and sentence, as aforesaid, and admits that your petitioner was arrested under said warrant and held for deportation and that James B. Bryan, District Director of Immigration at the Port of Honolulu, threatens to and will, unless restrained by this Honorable Court [21] deport petitioner, but denies that the said Secretary of Labor had any right, authority or jurisdiction to issue said warrant or to deport petitioner for the following reasons, towit:

(1) That petitioner in entering his plea, as aforesaid, did so under the express promise of the duly accredited representatives of the United States Attorney's office in the said Territory of Hawaii that petitioner would not be deported at the expiration of his said period of imprisonment and at the time of imposing sentence upon petitioner, the Honorable E. K. Massee, United States Judge presiding, ordered and directed, as authorized and provided in Section 155, Title 8, United States Code, that the said petitioner be not deported, all of which is more particularly set forth in Paragraph 5 of petitioner's petition herein, to which reference is hereby made and by this reference made a part hereof.

(2) That petitioner is addicted to the use of opium and is not a peddler or dealer in narcotic drugs of any kind or character.

III.

Admits that on or about the 12th day of August, 1932, a hearing was accorded petitioner by an Immigration Officer at the port of said Honolulu, as set forth in Paragraph 4 of said Return, but has not sufficient knowledge, information or belief to answer Paragraph 5 of said Return.

IV.

Admits that on or about the 26th day of September, 1932, a warrant for deportation was issued against petitioner and that petitioner was about to be deported when restrained by this Honorable Court. [22]

V.

And for further traverse to said Return, petitioner refers to and by reference makes a part hereof all the allegations of his said petition in the above entitled matter.

WHEREFORE, petitioner prays that upon a hearing hereof he may have such relief as may be meet and proper and that the Secretary of Labor and his deputies, assistants and agents be restrained and prohibited from taking any further steps toward the deportation of your petitioner and that he may go hence without day.

Dated October 26th 1932

(s) DANG NAM

Petitioner above named.

United States of America,
Territory of Hawaii.—ss.

Dang Nam, being first duly sworn, on oath, deposes and says: That he is the petitioner above named; that he has heard read and explained to him the foregoing Traverse to Return and knows the contents thereof and that the same is true.

(s) DANG NAM

Subscribed and sworn to before me this 26th day of Oct., 1932.

[Seal] (s) A. E. JENKINS
Notary Public, Second Judicial Circuit, Territory of Hawaii.

[Endorsed]: Filed Oct. 28, 1932. Wm. F. Thompson, Jr., Clerk. By Thos. P. Cummins, Deputy. [23]

PROCEEDINGS AT CONTINUANCE

From the Minutes of the U. S. District Court for the Territory of Hawaii
FRIDAY, October 7, 1932

[Title of Court and Cause.]

Upon stipulation between counsel the Court ordered that this matter be continued to Friday, October 14, 1932 at 2 p.m. [24]

PROCEEDINGS AT CONTINUANCE, WITNESSES INSTRUCTED TO APPEAR

From the Minutes of the U. S. District Court for the Territory of Hawaii

TUESDAY, November 22, 1932

[Title of Court and Cause.]

The Court ordered that the Clerk instruct the witnesses herein to appear November 23, 1932 at 9 a. m. [25]

PROCEEDINGS AT TRIAL; CONTINUANCE

From the Minutes of the U. S. District Court for the Territory of Hawaii.

WEDNESDAY, November 23, 1932

[Title of Court and Cause.]

Personally appeared the petitioner herein with Mr. E. J. Botts, his counsel, and also came the respondent herein by Mr. John Albert Matthewman, Assistant United States Attorney. A statement was made by the Court, by Mr. Botts and by Mr. Matthewman. The Court allowed the hearing to proceed subject to being thrown out, allowing the petitioner to put on proof as to whether he is a peddler or an addict. An exception was noted by

Mr. Matthewman. Mr. Matthewman offered the record of the hearing before the immigration officers, same was admitted in evidence as U. S. Exhibit #1, marked and ordered filed. Mr. Matthewman made a further exception which was noted. Dung Leong was called and sworn and testified on behalf of the petitioner. Mrs. Dang Nam was called and sworn to testify on behalf of the petitioner. This witness was withdrawn until the arrival of a Korean interpreter. Dr. Thomas Mossman was called and sworn and testified on behalf of the Petitioner Mrs. Dang Nam resumed the witness stand. Dang Nam was called and sworn and testified on his own behalf. At 12:25 the Court ordered that this case be continued to 1:30 p. m. Dang Nam resumed the witness stand. This witness was withdrawn and William Viela was called and sworn and testified on behalf of the respondent. Prescott A. Foo was called and sworn and testified on behalf of the respondent. Dang Nam resumed the witness stand. Charles Kekuewa was called and sworn and testified on behalf of the respondent. The time for adjournment having arrived the Court ordered that this case be continued to November 25, 1932 at 2 p. m. for further hearing. [26]

PROCEEDINGS AT FURTHER TRIAL

From the Minutes of the U. S. District Court for the Territory of Hawaii.

FRIDAY, November 25, 1932

[Title of Court and Cause.]

On this day came the petitioner herein by Mr. E. J. Botts, his counsel, and also came the respondent herein by Mr. John Albert Matthewman, Assistant United States Attorney, and this case was called for further hearing. Statements were made by Mr. Botts and Mr. Matthewman. The Court ordered that Mr. Botts file the pleadings he intends to file by the first part of the week. The respondent was allowed five days in which to answer. [27]

Form 8 B
Bureau of Immigration
4280/621
No. 55804/231

WARRANT—DEPORTATION OF ALIEN

United States of America
Department of Labor
Washington

Office of District
Director, Honolulu, T. H.
Received Oct. 11, 1932

To: DISTRICT DIRECTOR OF IMMIGRATION
Honolulu, T. H.

Or to any Officer or Employee of the United States Immigration Service

WHEREAS, from proofs submitted to—me—Assistant to the Secretary, after due hearing before Immigrant Inspector Charles B. Borella, held at Honolulu, T. H., I have become satisfied that the alien DANG NAM alias DANG SAU SANG alias TSAN NAM, who landed at the port of Honolulu, T. H. ex SS "Coptic", on or about the 5th day of June, 1896, has been found in the United States in violation of the immigration act of February 18, 1931, to-wit. That since February 18, 1931, he has been convicted and sentenced for violation of a statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, and is not within an exception to the aforementioned act, and may be deported in accordance therewith:

I, W. N. Smelser, Assistant to the Secretary of Labor, by virtue of the power and authority vested in my by the laws of the United States, do hereby command you to return the said alien to—China—the country whence he case, at the expense of the appropriation "Salaries and Expenses, Bureau of Immigration, 1933", including the expenses of an attendant, if necessary. Execution of this warrant should be deferred until such time as the alien is released from imprisonment.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 26th day of September, 1932.

(Seal) (s) W. N. SMELSER,
Assistant to the Secretary of Labor.

[28]

Treasury Department
U. S. Public Health Service
Form 1975

MEDICAL CERTIFICATE

Station Hon. T. H. August 16, 1932

Name Dang Nam
Age 51 Sex Male
Nat. China Race Chinese
Date arrival
SS.
Class Manifest No.

This is to certify that the above-described person has this day been examined and is found to be afflicted with:

I have this day examined the above named and in my opinion he is able to travel without danger to life or health in event of deportation. He will not require special care or attention on voyage.

EXHIBIT "B"

(s) E. W. Norris, P. A., Surgeon
4280/621

[29]

Treasury Department
U. S. Public Health Service
Form 1975

MEDICAL CERTIFICATE

Station Hon. T. H. July 18, 1932

Name Dang Nam
Age 51 Sex Male
Nat. China Race Chinese
Date arrival
SS.
Class Manifest No.

This is to certify that the above-described person has this day been examined and is found to be afflicted with:

I have this day examined the above named chinese male and have found no evidence that he is addicted to the use of drugs. In my opinion he was not an addict at the time of his conviction April 18, 1932.

EXHIBIT "A"

(s) E. W. Norris, P. A., Surgeon

4280/621 [30]

Form 607

U. S. DEPARTMENT OF LABOR
Immigration Service

File No. 4280/621

Report of Hearing in the Case of
DANG NAM alias DAN SAU SANG
Alias TSAN NAM
Under Department Warrant No. 55804/231.

Dated June 29, 1932 (Telegraphic). Hearing conducted by Inspector Borella at Honolulu, T. H. Date July 18, 1932.

Alien placed under arrest at City and County Jail, Honolulu, T. H. July 18, 1932 at 11 p. m. by Inspector Charles B. Borella and allowed to remain there.

Testimony taken and transcribed by Willis K. Leong.

Said DANG NAM alias DAN SAU SANG alias TSAN NAM, being unable to speak and understand the English language satisfactorily, an interpreter, named Willis K. Leong, competent in the Chinese language, was employed.

Said DANG NAM alias Dan Sau Sang alias Tsan Nam was informed that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country whence he came, said warrant of arrest being read and each and every allegation therein contained carefully explained to him. Said alien was offered an opportunity to inspect the warrant of arrest and the evidence upon which it was issued, which privilege was not accepted. The alien being first duly sworn, the following evidence was presented:

Q. What is your correct name?

A. Dang Nam, my marriage name is Dang Sau Sang.

Q. Have you ever been known by another name?

A.

Q. You are advised that under these proceedings you have the right to be represented by counsel. Do you desire to obtain the services of a lawyer?

A. Yes. [31]

Q. Have you funds to employ an attorney?

A. Yes.

Q. Who will you employ as your attorney?

A. E. J. Botts.

Q. When will you be ready to proceed with this hearing?

A. I will be ready to proceed at any time, but I would like to have you make arrangements with my attorney, and whenever he is ready, I will proceed with the hearing.

You are advised that if you employ an attorney, it will be necessary for you to pay for his services. Do you understand?

A. Yes.

Hearing deferred until arrangements for a hearing may be made with Attorney Botts.

(s) CHARLES B. BORELLA,
Immigrant Inspector [32]

U. S. DEPARTMENT OF LABOR
Immigration Service
Honolulu, T. H.

File No. 4280/621 DANG NAM case continued. August 12, 1932.

Present: C. B. Borella, inspector; W. K. Leong, interpreter; Mildred Beese, stenographer; E. J. Botts, attorney at law; ALIEN in person.

ALIEN SWORN,

testifies through interpreter as follows:

Q. What are all your names?

A. Dang Nam; marriage name Dang Sau San; no other names.

Q. Are you the same Dang Nam alias Dang Sau San on whom I served a Warrant of Arrest in this prison on July 18, 1932?

A. Yes.

Q. At that time you were advised that you had a right to be represented by counsel and you stated that you desired the services of an attorney and that you would employ Mr. E. J. Botts as counsel. Is that correct?

A. Yes.

Q. Are you now willing and ready to proceed with this hearing?

A. It is entirely up to my attorney.

To Mr. Botts:

Q. Are you ready to proceed with this hearing?

A. Yes, we are ready to proceed.

To alien:

Q. Where and when were you born?

A. I was born at Sam Chow village, Heung Shan district, China on the 8th month, 13th day, Chinese count, I don't remember the year. I am about 53 or 54 years old.

(Testimony of Dang Nam.)

Q. Of what country are you a citizen or subject?

A. Citizen of China.

Q. When and under what name did you first come to the Hawaiian Islands?

A. I don't remember the exact year but it was about 36 or 37 years ago under the name of Dang Nam on the s.s. "Coptic".

Q. At that time did you land in Honolulu?

A. Yes.

Q. At what port did you embark?

A. At Hongkong.

Q. Have you made any trips out of the Hawaiian Islands since your arrival here 36 or 37 years ago?

A. No.

Q. Are you the same Dang Nam that made sworn statements to me at this prison on May 18, 1932?

A. Yes.

Q. Were all the statements you made at that time true and correct?

A. I have forgotten what I said then.

Q. On July 18, 1932 you were examined by Dr. E. W. Norris of the United States Public Health Service. At that time he issued a certificate in your [33] case which reads as follows: "Honolulu, T. H. July 18, 1932; name Dang Nam; age 51; male; nationality China; race Chinese. I have this day examined the above named Chinese male and have found no evidence that he is addicted to the use of

(Testimony of Dang Nam.)

drugs. In my opinion he was not an addict at the time of his conviction April 18, 1932. Signed E. W. Norris, P. A. Surgeon". You are advised that on July 20, 1932 a copy of the statement that you made to me at this prison on May 18, 1932 and the medical certificate issued by the public health doctor on July 18, 1932 were furnished to your attorney on July 20, 1932. You are advised that this medical certificate is marked exhibit "A" and made a part of the record?

A. Yes.

Q. I will now show you all the evidence upon which a warrant of arrest was issued in your case. It consists of a certified copy of indictment filed February 12, 1932; a certified copy of commitment which shows you were convicted and sentenced to six months imprisonment in the City and County Jail, Honolulu, T. H. April 18, 1932 for violation of Section 1 of the Act approved December 17, 1914, as amended; certified copy of the Court minutes wherein the Court stated among other things that you will not be deported; a copy of your sworn statement made to me at this jail May 18, 1932. This evidence is already in possession of the Secretary of Labor at Washington, D. C. who will consider same together with all the evidence presented at this hearing or in connection with this hearing prior to arriving at his final decision in your case. Do you wish to examine the evidence?

(Testimony of Dang Nam.)

A. I wish my attorney to examine it.

Attorney Botts examines the evidence upon which the Warrant of Arrest was issued in this case.

Q. Were you ever arrested at any time for violation of the narcotic laws prior to your last arrest?

A. No.

Q. Have you ever been arrested for any offense at any time other than for the offense for which you are now serving a sentence?

A. About twenty years ago in Hilo I knew about a white man bringing opium into Hilo and was asked by the government to appear as a witness against him at which time I refused and was fined by the Court.

Q. Have you ever sold opium or narcotic drugs at any time?

A. No.

Q. Have you ever dealt in narcotics?

A. No.

Q. Did you ever peddle narcotics?

A. No.

Q. Are you now a drug addict?

A. I used to smoke opium but at present I do not use very much except when I am sick.

Q. Were you at one time an habitual smoker of opium?

A. Yes about seven or eight years ago.

Q. When did you quit the habitual use of opium?

A. In 1926.

(Testimony of Dang Nam.)

Q. When you were convicted and sentenced to six months at the City and County Jail on April 18, 1932 were you a drug addict?

A. No.

Q. You are advised that the purpose of this hearing is to offer you an opportunity to show cause if any there be as to why you should not be deported to China the country whence you came in accordance with law. Have you any evidence to offer as to why you should not be deported?

A. I will leave that up to my attorney.

Q. Have you anything to say as to why you should not be deported?

A. I have nothing to say. [34]

To attorney:

Q. Have you any evidence to introduce at this time to show cause if any there be as to why this alien should not be deported?

A. I wish to be sworn to make a statement in the record respecting the proceedings in the Federal Court leading up to the plea entering Dang Nam in that Court on April 18, 1932.

ATTORNEY BOTTS SWORN.

My name is E. J. Botts and I am an attorney-at-law practicing in all the courts in the Territory and have so practiced for seventeen years. I was employed to represent Dang Nam following his in-

(Testimony of Attorney Botts.)

dictment for narcotic violation on February 12, 1932 and attended Court with him shortly thereafter when he entered plea of not guilty to both counts in the indictment. Thereafter I entered into negotiations with the U. S. District Attorney's office, particularly with Mr. Moore of that office, to see if a settlement could be reached without the necessity of a trial. The Government's evidence indicating the search of the dwelling of Dang Nam a small amount of opium was found in a garment in the bathroom. After some negotiation with Mr. Moore it was agreed that if Dang Nam entered a plea of guilty he would receive a sentence of six months in the City and County Jail and that the Court would order that he should not be deported at the expiration of his sentence. In these negotiations with the District Attorney, we did not admit and we do not admit now that Dang Nam was actually the possessor of the opium or any opium and the plea entered was in the nature of a "Nolo Contendere" and I believe recognized as such by the District Attorney's office. In reliance upon the promise and assurance of the District Attorney and the Court on said April 18, 1932 Dang Nam entered a plea of guilty to the indictment. At the request of Mr. Moore the plea was entered to the second count which charges the violation of the Act of December 17, 1914, as amended. The Court, upon receiving the plea of the defendant, sentenced him in conformity with the understanding and arrangement

(Testimony of Attorney Botts.)
and expressly stated that at the expiration of the six months imprisonment Dang Nam should not be deported. We relied upon this order of the Court and the good faith of the officers who made it and believe that the order should be upheld by the Secretary.

Q. Had you known that your client would have faced deportation proceedings if convicted, would you have advised him to plead guilty?

A. I advised him not to plead along that line because I felt that the Government's case was one that could not be sustained. The jury would have acquitted him. The defendant was apprehensive of his chances of being deported if he were convicted and the only reason why he did plead guilty was to avoid my risk of deportation.

To alien:

Q. Have you ever been married?

A. Yes, I was married three times.

Q. Are you married at the present time?

A. Yes.

Q. What is the name of your wife?

A. Ha Quen a Korean woman.

Q. Is she a native of Korea?

A. Yes.

Q. When were you married to her?

A. In 1925 or 1926. [35]

Q. Did you have any children by your first two wives?

A. No.

(Testimony of Attorney Botts.)

Q. Have you any children by your present wife?

A. One son only Dang Kwan Shou, six years old, born in Honolulu.

Q. Where is your wife and child now residing?

A. At Wailuku, Maui.

Q. Was your father ever a citizen of the United States?

A. My father was in the Hawaiian Islands but I don't know whether or not he was ever naturalized as a citizen.

Q. Is your father living?

A. No, he is dead.

Q. What was his name and when did he die?

A. Dang Lung.

Q. Do you know how long he was in the Hawaiian Islands?

A. I don't know.

Q. Have you any evidence that he ever was a citizen of Hawaii?

A. I don't know if he was ever naturalized as a citizen of Hawaii; I have no evidence.

Q. In the event that you are ordered deported to China to whom do you wish to be sent?

A. I don't know.

Q. Have you any near relatives in China?

A. I have a sister whose name is Dang Ngo living in Nam Sui village, Heung Shan district China.

Q. Would you want to be sent to her if you were ordered deported?

(Testimony of Attorney Botts.)

A. I want to leave that up to my attorney.

Q. In the event that you are ordered deported to what port in China would you like to be sent?

A. You will have to ask my attorney.

Q. Are you in good health at the present time?

A. I feel a little bit ill now.

Q. What is the nature of your illness?

A. Heart burn.

Q. You are advised that under the Act of March 4, 1929, as amended, you will, if ordered deported, and thereafter enter or attempt to enter the United States, be guilty of a felony and upon conviction thereof shall be liable to imprisonment for not more than two years, or a fine of not more than $1000, or both such fine and imprisonment, unless subsequent to a year from deportation or departure under warrant you both apply for and obtain from the Secretary of Labor permission to apply for admission and thereafter make a legal application for admission. Do you understand?

A. Yes.

Witness, Mr. CHARLES KEKUEWA,

jailer, sworn, testifies in English as follows:

Q. What is your name and official title?

A. Charles Kekuewa; Jailer at the City and County Jail, Honolulu.

Q. Who is this person? (indicating alien).

(Testimony of Mr. Charles Kekuewa.)

A. Dang Nam.

Q. How long has he been in this institution?

A. He came here April 18, 1932 and has been here since that time.

Q. Is he a drug addict to your knowledge?

A. Not that I know of.

Q. Has he ever asked you for any narcotic drugs?

A. No.

Q. Has he indicated a desire for such narcotic drugs?

A. No.

Q. Have you ever heard any of the other prisoners say that he was a drug addict?

A. No. [36]

Q. To your knowledge has he ever had the use of opium while in this institution?

A. No.

Q. Have you anything further to state?

A. I know he came to me to see a physician for his health and I sent for the city physician Mr. Mossman for examination and he said that he has the touch of T. B. and was ordered by the doctor to be placed in confinement and give him plenty of rest and to see the physician twice a week.

Q. Does he work?

A. No.

Q. Has he ever refused to work because of his health?

(Testimony of Charles Kekuewa.)

A. No; we don't force prisoners here to work unless they have to.

Q. From his general habits and manner while here would you say that he was a sick man?

A. Yes, he is.

Q. Have you anything further to say?

A. No.

To Mr. Botts:

Q. Do you desire to ask Mr. Kekuewa any questions?

A. No.

To Mr. Kekuewa:

Q. Have you understood all the questions?

A. Yes.

To Alien:

Q. Have you anything further to say?

A. No.

Q. Have you understood the interpreter and all the questions?

A. Yes.

To Mr. Botts:

Q. Do you desire to ask this alien any questions?

A. No.

Q. Have you anything to state?

A. I would like to get in touch with Dang Nam's wife who is on Maui and produce her as a witness in his behalf and I will wireless her tonight asking her to come at once to Honolulu and if she can come I will present her at the Immigration Bureau Tuesday at 9:30 A. M. If she can't come we will have to close the hearing.

(Testimony of Charles Kekuewa.)

Q. You are advised that when this hearing is completed you will be furnished a copy of same and you may submit a brief to Washington at the time this record is forwarded?

A. Yes.

Physical description of alien Dang Nam: Height: 5′ 6″. Pock mark above right eyebrow; scar right index finger; scar left index finger; hair black; eyes brown. [37]

4280/621 August 16, 1932.

Note by Inspector Borella:

Mr. E. J. Botts, attorney for Dang Nam, telephoned this morning advising me that he would not present Dang Nam's wife as a witness; that he had no further evidence or witnesses to introduce and that he considered the hearing closed.

In view of the fact the record indicates that the alien Dang Nam is afflicted with T. B., he will be examined by a doctor of the U. S. Public Health Service who will issue a certificate as to his findings in which he will state:

(1) whether such alien is in condition to be deported without danger to life;

(2) whether he will require special care and attention on the voyage.

Said certificate will be marked exhibit "B" and made a part of this record.

Mr. Botts has been informed accordingly and advised that he has the right to be present during said physical examination but he waived his right. Mr. Botts was further advised that he would be furnished with a copy of the medical certificate together with transcript of this hearing.

The following medical certificate has been issued on this date (August 16, 1932)
Station Hon. T. H. August 16, 1932
Name Dang Nam
Age 51 Sex Male
Nat. China Race Chinese

I have this day examined the above named and in my opinion he is able to travel without danger to life or health in event of deportation. He will not require special care or attention on voyage.

(Signed) E. W. Norris P. A. Surgeon

The above certificate is marked Exhibit "B" and made a part of this record. [38]

Form 607, Sheet 2
File 4280/621

U. S. DEPARTMENT OF LABOR
Immigration Service
August 19, 1932

SUMMARY:

The record in this case shows that DANG NAM alias DANG SAU SANG alias TSAN NAM is an

alien, native and citizen of China; that he is in the United States in violation of the act of February 18, 1931, in that since February 18, 1931, he has been convicted and sentenced for violation of a statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, and is not within any exception to the aforementioned act.

RECOMMENDATION:

In view of the fact that the charge in this case has been sustained, it is recommended that this alien be deported to China, the country whence he came, at the expense of the Government upon his lawful release from prison.

(S) CHARLES B. BORELLA
Charles B. Borella
Immigrant Inspector.

I certify that the foregoing is a true and correct transcript of the record of hearing in this case.

(S) MILDRED BEESE
Mildred Beese,
Stenographer [39]

Bureau of Immigration
Form 8-A

Office of District Director, Honolulu, T. H. Received Sep. 8, 1932

WARRANT—ARREST OF ALIEN

United States of America

No. 4280/621 Department of Labor

Washington

No. 55804/231

To DISTRICT DIRECTOR OF IMMIGRATION, Honolulu, T. H.,

Or to any Immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien DANG NAM, alias DANG SAU SANG, alias TSAN NAM, who landed at the port of Honolulu, T. H., ex SS "Coptic", about the year 1895, has been found in the United States in violation of the immigration act of February 18, 1931, in that since February 18, 1931, he has been convicted and sentenced for violation of (or conspiracy to violate) a statute of the United States, taxing, prohibiting, or regulating the manufacture, production compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, and is not within any exception to the aforementioned act.

I, W. N. Smelser, Assistant to the Secretary of Labor, by virtue of the power and authority vested in my by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with the law. The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Salaries and Expenses, Bureau of Immigration, 1932". Pending further proceedings, the alien should be permitted to remain in his present location without expense to the Immigration Service.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 29th day of June, 1932.

[Seal] (s) W. N. SMELSER,
Assistant to the Secretary of Labor. [40]

U. S. DEPARTMENT OF LABOR
Immigration Service
Honolulu, T. H.

4280/621

In the Matter of DANG NAM, touching his right to be and remain in the United States.

Statement taken at the City and County Jail, Honolulu, T. H. this 18th day of May, 1932.

Present: Charles B. Borella—Examining Inspector
Ruth B. Lanke—Stenographer
Willis K. Leong—Interpreter
Alien in person.

Examining Inspector addressing alien:

You are advised that I am an immigrant inspector having power to administer oaths and take and consider evidence touching the right of any alien to enter, reenter, pass through or reside in the United States; that a statement is desired from you, such statement to be voluntary on your part and under oath and may be used against you in subsequent proceedings.

Q. Are you willing to make such a statement?

A. Yes.

ALIEN

first duly sworn testifies through interpreter as follows:

Q. What are all your names?

A. Dang Nam. My marriage name is Dang Sau Sang.

Q. How old are you and where and when were you born?

A. I am 54 years old; born at Sam Jo Village, HSD, China. I was born in the 8th month, 13th day, Chinese count; I do not remember the year. (K.S. 4—8th month, 13th day—September 9, 1878).

Q. Of what country are you now a citizen or subject?

A. Citizen of China of the Chinese race.

(Testimony of Dang Nam.)

Q. When and under what name did you first come to the Hawaiian Islands?

A. I first came here about 36 or 37 years ago under the name of Dang Nam on the ss "Coptic". I embarked at Hong Kong and landed at the port of Honolulu.

Q. Have you made any trips out of the Hawaiian Islands since your arrival about 36, 37 years ago?

A. No.

Q. Have you a certificate of residence?

A. It is at the immigration station. I left it there when I made application for a return certificate last year about October.

Q. Is your certificate of residence issued in the name of Dang Nam?

A. Yes.

Q. Are you the same Dang Nam that was sentenced to imprisonment in the City and County Jail for six months on May 2, 1932 for violation of the narcotic laws?

A. Yes.

Q. Did you plead guilty when you were arrested for the violation of the narcotic laws?

A. Yes; I had opium in my possession.

Q. Did the Judge recommend that you be not deported when he sentenced you?

A. I do not know because I was represented by an attorney. [41]

Q. Have you ever been arrested before?

A. No.

(Testimony of Dang Nam.)

Q. Were you ever arrested in China prior to your coming to Hawaii?

A. No.

Q. Have you ever sold opium or any other drug at any time?

A. No.

Q. Have you ever peddled any narcotic drugs?

A. No.

Q. Have you ever been a dealer in narcotics?

A. No.

Q. Are you a drug addict?

A. I have been smoking since 1925.

Q. How did you happen to have opium in your possession when you were arrested if you are not an addict?

A. I did not have it on my person, it was in my yard. I do not know who it belonged to. It did not belong to me.

Q. How many times have you been married?

A. Three times.

Q. Have any of your wives ever resided in the Hawaiian Islands?

A. They all have resided in the Hawaiian Islands.

Q. What is the name of your present wife?

A. She is a Korean woman by name of Har Quen.

Q. Have you any children by her?

A. I have one son—Dang Quan Sur, age 6, born in Honolulu, now residing at Wailuku, Maui with his mother.

Q. What are the names of your first two wives?

(Testimony of Dang Nam.)

A. First one is a Hawaiian woman by name Kalana; she died in Maui about 4 or 5 years ago. I had no children by her. My second wife was Wong Kui, I do not know where she was born. We were divorced ten years ago. I had no children by her.

Q. What was your occupation and address before you were arrested?

A. I peddled silks and material and lived at Wailuku, Maui.

Q. When and where did you marry your present wife?

A. I married her in Honolulu about January, 1926.

Q. Do you believe in the overthrow of organized government by force or violence?

A. No.

Q. Have you ever been connected with a house of prostitution in any way?

A. No.

Q. Why did you plead guilty to the violation of the narcotic laws if the narcotics which were found were not in your possession and did not belong to you?

A. I pleaded guilty because a small quantity was found in my wife's room. She used that as medicine.

Q. Did the authorities find some marked money on you which you had taken in exchange for the sale of opium?

(Testimony of Dang Nam.)

A. An informer gave marked money to my wife and she gave it to me.

Q. How did your wife happen to receive this marked money?

A. I do not know how my wife got the money.

Q. Have you anything to state?

A. No; except that I have always been a merchant since 1919.

Q. Have you understood the interpreter at all times?

A. Yes.

Physical description: Pock mark above right eyebrow; scar right index finger; scar left index finger. Height 5 ft. 6 ins. without shoes.

Note: The prison records of this institution do not contain finger print impressions or photographs of this alien or physical description. [42]

Note: File 4380/2783 re Tsan Nam contains certificate of residence No. 9338 issued to Tsan Nam at Honolulu, T. H. May 9, 1901. This file also shows that Tsan Nam applied for Form 432 at this office June 22, 1931 and photograph attached thereto is that of the above named alien. There is a memorandum in this file showing that on August 1, 1931 Tsan Nam withdrew his application for Form 432.

Certified a true transcript.

(s) RUTH B. LANKE
Stenographer.

(s) CHARLES B. BORELLA
Immigrant Inspector. [43]

Form 110
Treasury Department
U. S. Narcotic Service
January 1931

STATEMENT OF ALIEN CHARGED WITH VIOLATION OF FEDERAL NARCOTIC LAWS

Case No. H-4214 Office of Narcotic Agent in Charge,
Name of Alien Dang Nam Wailuku, Maui, T. H.
January 25, 1932

Director of Immigration,
At Honolulu, T. H.

The following statement was made before Wm. K. Wells, Narcotic Agent at Wailuku, Maui, T. H. on January 25, 1932:

Q. What is your name?
A. Dang Nam.
Q. Sex?
A. Male.
Q. What is your age?
A. 53.
Q. Where were you born?
A. Macao, China.
Q. What is your nationality?
A. Chinese. China.
Q. When and where did you last enter the U. S.?
A. 1896 at Honolulu, T. H.
Q. By what means did you last enter the U. S.?
A. S. S. Coptic.
Q. Were you at that time inspected by an Immigrant Inspector?

A. No.

Q. Did you at time of last entry have an unexpired Immigration Visa?

A. No.

Q. Did you at time of last entry have a Visaed Passport?

A. No.

Q. For what purpose did you come to the United States?

A. Coolie laborer.

Q. What is your present residence address?

A. Vineyard St., near Market St., Wailuku, Maui, T. H.

(s) DANG NAM
Dang Nam.

I hereby certify that the foregoing is a true record of the statements made to me by the alien above named, and that said alien has been charged with violation of the Federal narcotic laws in the Federal Court at Honolulu, T. H. and is now on bond for trial.

Remarks: The defendant was arrested after he had made two sales of smoking opium and the marked money was found on his person, and a quantity of opium was found on the premises. He plead guilty on April 18, 1932, before Judge E. K. Massee and was sentenced to 6 Mos. in the City and County Jail at Honolulu (2nd ct.) mittimus stayed until May 2, 1932—and placed on probation for 3 yrs. (1st Ct.) and ordered to report at the Narcotic Office when released from jail, and to report to the probation officer

once during the first week of each month for six months, upon expiration of prison sentence. [44] The Court recommended that he be not deported unless he is apprehended for violation of the provisions of his probation imposed under Count I.

(s) WM. K. WELLS
Wm. K. Wells

Respectfully submitted,

(s) C. T. STEVENSON
C. T. Stevenson,
Assistant Narcotic Agent in Charge.

Received
Office of District Director,
Apr. 20, 1932
U. S. Immigration Service,
Honolulu, T. H. [45]

[Title of Court and Cause.]

SYLLABUS.

1. Aliens—Deportation of, for violation of Narcotic Laws. An alien may be deported under the Act of February 18, 1931, (8 U. S. C. A. 156a), even though the Judge sentencing such alien recommended no deportation.

2. Same—Manner of Deportation. Congress in enacting the Act of 1931 did so with knowledge of the interpretation placed upon the words "upon warrant issued by the Secretary of Labor, be taken

into custody and deported in accordance with the provisions of" by the Ninth Circuit Court. Instead of using these words it used the words "be taken into custody and deported in manner provided in". It must have meant just what it so clearly expressed, that is, to adopt only such parts of sections 19 and 20 as provided the manner of taking into custody and the manner of deporting. Section 19 provides this shall be "upon warrant of the Secretary of Labor", while section 20 designates the ports to which the alien shall be deported and the details relative to expense. Under section 19, and regulations, the Secretary issues two warrants, one for taking the alien into custody and one for deporting him. [47]

[Title of Court and Cause.]

DECISION.

The Petitioner, on April 18, 1932, pleaded guilty to a violation of the Harrison Narcotic Act and was sentenced to six months in jail. At the time of the sentence the Court stated that it recommended no deportation. Deportation was later ordered under the Act of February 18, 1931, 46 Stat. 1171 (8 U. S. C. A., 156a) and Petition for Writ of Habeas Corpus was filed. It was stipulated that the only point to be decided is, whether or not, in view of the provisions of the above Act, the recom-

mendation of the Judge is binding on the Secretary of Labor and prevents deportation.

The Act above cited is as follows:

> "Any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this section) who, after February 18, 1931, shall be convicted and sentenced for violation of or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in Sections 155 and 156 of this title".

Prior to the passage of this Act, deportation for conviction of offenses connected with narcotics was limited to violation of the Act of May 26, 1922, as amended, (42 Stat. [48] 596, (21 U. S. C. A., Sec. 174)), relating to smuggling or unlawful connection with smuggled drugs, knowing the same to have been imported contrary to law, and the deportation statute provided that they should "upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917", (155 and 156, Title 8 U. S. C. A.).

The Ninth Circuit Court of Appeals, in Weedin

v. Moy Fat, 8 F. (2d) 488, held that so much of section 19 as allowed deportation only when sentenced to more than one year was controlling and in Hampton v. Wong Ging, 299 Fed. 289, the same court held that the part of section 19, supra, relative to not allowing deportation where the court recommended against same was controlling in deportation in narcotic cases. In the Moy Fat case the court stated:

> "It is suggested * * * that the Act of May 26, 1922, in adopting sections 19 and 20 of the prior Act, was intended to prescribe only the manner of taking into custody and the manner of deportation, but we think it more inclusive and limits the authority to deport".

In Chung Que Fong v. Nagle, 15 F. (2d) 789, having reference to whether or not an alien could be so deported after five years after entry, the same court, after reviewing the two former cases, stated:

> "And the language of the Wong Ging decision that the Narcotic Act 'adopts the whole of the provisions relative to deportation contained in those sections (sections 19, 20, Immigration Act) * * *' is to be construed to mean that such provisions are adopted as are not the subject of express terms in the Narcotic Act amendment inconsistent therewith".

The only reported case dealing expressly with the provisions of the Act of February 18, 1931, is The

Conte Grande (D. C., N. Y.) 53 F. (2d) 475, where the court stated: [49]

> "This statute further provides that the deportation shall be 'in the manner provided in sections 19 and 20' of the Immigration Act of 1917 (8 U. S. C. A. secs. 155, 156). Counsel for the alien argues that by reason of the reference to these parts of the act of 1917, there can be no lawful deportation except for a cause and under conditions specified in sections 19 and 20 of the 1917 act. So to construe the new statute would nullify it. It is therein expressly provided that the 'manner' of the deportation shall be in accord with the provisions of the older statute. Sections 19 and 20 of the 1917 act (8 U. S. C. A. secs. 155, 156) prescribe what the manner of a deportation thereunder shall be. It is only to the extent of the manner thereby prescribed that the 1931 act requires that they be complied with. For this reason the court decisions cited by counsel as to the conditions of deportation under sections 19 and 20, as they existed previous to the Act of February 18, 1931, are not of assistance and have no pertinency here".

Counsel for Petitioner contends that because the House Bill was designated "an act to amend section 19 of the Act of February 5, 1917", the Act in question now stands as an amendment to said section 19.

Whether termed an amendment to section 19 or otherwise its language is too plain to give it the construction urged by counsel. However, a more diligent search of the Congressional Record would have shown that on February 10, 1931 (Record p. 4562) the title was amended in the Senate to read: "A Bill to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics". This amendment was agreed to by the House, February 14, 1931, (Record p. 5028), which title the Act bore when approved.

Congress in enacting the Act of 1931 did so with knowledge of the interpretation placed upon the words "upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of" by the Ninth Circuit Court and when, instead of using these [50] words it used the words "be taken into custody and deported in manner provided in", it meant just what it so clearly expressed, that is, to adopt only such parts of sections 19 and 20 as provided the manner of taking into custody and the manner of deporting Section 19 provides this shall be "upon warrant of the Secretary of Labor", while section 20 designates the ports to which the alien shall be deported and the details relative to expense. Under section 19, and regulations, the Secretary issues two warrants, one for taking the alien into custody and one for deporting him.

It is therefore apparent that the recommendation of the Court in the instant case had no binding effect upon the Department of Labor, and was ineffective to prevent deportation by the Secretary.

Having been the Judge who recommended no deportation, I regret exceedingly that I must be the one to arrive at the above finding, but I see no escape from the conclusion here reached.

IT IS THEREFORE ORDERED, That the Writ be discharged and the Petitioner remanded to the defendant within ten days from the filing of the Order in this case, or such further time as may be ordered by the Court.

An Order to this effect will issue.

Dated: Honolulu, T. H., December 1, 1932.

(s) EDWARD K. MASSEE,
Judge United States District Court, Territory of Hawaii.

[Endorsed]: Filed Dec. 1, 1932. Wm. F. Thompson, Jr., Clerk. By Thos. P. Cummins, Deputy.

[51]

Habeas Corpus No. 252

In the United States District Court for the Territory of Hawaii

In the Matter of the Application of
DANG NAM
For a Writ of Habeas Corpus

JUDGMENT

WHEREAS, on October 3, 1932, there was filed

the petition of Dang Nam, alleging that James B. Bryan, District Director of Immigration was unlawfully holding in custody, and about to deport, the said Dang Nam, and praying that a writ of habeas corpus issue directing the said James B. Bryan to produce the body of the said Dang Nam before this court "to do, submit to and receive what the law may require"; and

WHEREAS, on the same day, a writ of habeas corpus did issue with such directions to the said James B. Bryan; and

WHEREAS, on October 17, 1932, the said James B. Bryan filed a return to the writ of habeas corpus, in which return he alleged, inter alia, that the said Dang Nam, being an alien—who is not an addict who is not a dealer in, or peddler of, any of the narcotic drugs hereinafter mentioned in this paragraph—was convicted and sentenced in the United States District Court for the Territory of Hawaii for the violation of a "statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, [53] dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium, coca leaves", and that he, the said James B. Bryan, for that reason was about to deport the said Dang Nam unless restrained from so doing by the court; and

WHEREAS, on October 18, 1932, the said Dang Nam filed a traverse to the return, in which traverse he set up, inter alia, that he is such an addict and not such a dealer; and

WHEREAS, on November 23 and 25, 1932, hearings were had upon the issues presented by the traverse to the return; and

WHEREAS due consideration has been given to the law and the facts thus presented to the court; now, therefore

IT IS HEREBY ADJUDGED that the said Dang Nam, being an alien—who is not an addict who is not a dealer in, or peddler of, any of the narcotic drugs hereinafter mentioned in this paragraph—was convicted and sentenced in the United States District Court for the Territory of Hawaii for the violation of a "statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium, coca leaves", that rightfully he may be deported by the said James B. Bryan, that the writ of habeas be discharged and that the said Dang Nam be remanded to the said James B. Bryan within ten days from the filing of this judgment.

(s) EDWARD K. MASSEE
Judge.
United States District Court
Territory of Hawaii.

Honolulu, Hawaii
December 3, 1932. [54]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable, the Presiding Judge of the Above Entitled Court:

The above named, DANG NAM, conceiving himself aggrieved by the judgment in the above-entitled cause made and entered on the 3rd day of December, 1932, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, for the reasons set forth in the assignment of errors to be filed herein, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of all proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Judicial Circuit of the United States.

Dated this 21 day of Dec., A. D. 1932.

DANG NAM

By (s) E. J. Botts

His Attorney.

[Endorsed]: Filed Dec. 21, 1932. Wm. F. Thompson, Jr., Clerk. By Thos. P. Cummins, Deputy. [56]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now DANG NAM, above named, and files the following assignment of errors on which he will rely in the prosecution of his appeal in the above entitled cause from the judgment entered herein on the 3rd day of December, 1932, in the United

States District Court in and for the District and Territory of Hawaii:

1. That the court erred in dismissing the petition herein and ordering the petitioner remanded to the respondent for deportation.

2. That the court erred in holding and deciding that the Act of February 18, 1931 (Section 156-a, Title 8, U. S. Code) providing for the deportation of aliens convicted of violations of the Harrison Narcotic Act, (Act of December 17, 1914) made such deportation mandatory and deprived the court in such cases of the power granted to it under Section 19 of the Immigration Act of February 5, 1917 (Section 155, Title 8, U. S. Code) to recommend against deportation.

3. The defendant, having pleaded guilty herein to a violation of the Harrison Narcotic Act (Act of December 17, 1914) and the court, at the time of sentencing said defendant, having recommended, as provided in Section 19 of the Immigration Act of February 5, 1917 (Section 155, Title 8, U. S. Code) that he should not be deported at the termination of his sentence, [58] the court erred in holding and deciding herein that such recommendation was without effect in staying the deportation of defendant and that notwithstanding such recommendation defendant must be remanded to the custody of the immigration authorities for deportation.

WHEREFORE, the appellant prays that said judgment be reversed and that said District Court for the District and Territory of Hawaii be ordered

to enter a judgment sustaining the writ of habeas corpus herein and discharging appellant.

(s) E. J. BOTTS
Attorney for Appellant.

[Endorsed]: Filed Dec. 21, 1932. Wm. F. Thompson, Jr., Clerk. By Thos. P. Cummins, Deputy. [59]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon application of DANG NAM and upon the motion of his attorney, E. J. Botts, Esquire,

IT IS HEREBY ORDERED that the petition for appeal, heretofore filed by the above-named Dang Nam, be and the same is hereby granted; and that an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit from the final judgment, heretofore, on the 3rd day of December, 1932, filed and entered herein, be and the same is hereby allowed, and that a transcript of the record of all proceedings and papers upon which said final judgment was made, duly certified and authenticated, be transmitted, under the hand and seal of the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California.

Dated this 21 day of December, 1932.

(s) EDWARD K. MASSEE
Judge,
United States District Court,
District and Territory of Hawaii.

Received a copy of the above order.

(s) SANFORD B. D. WOOD
United States Attorney.

[Endorsed]: Filed Dec. 21, 1932. Wm. F. Thompson, Jr., Clerk. By Thos P. Cummins, Deputy. [61]

[Title of Court and Cause.]

COST BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, DANG NAM, of Wailuku, County of Maui, Territory of Hawaii, as principal, and FRANK NICHOLS and ED. TOWNSEND, of Honolulu, City and County of Honolulu, Territory of Hawaii, as sureties, are held and firmly bound unto the United States of America in the sum of Five Hundred Dollars ($500.00) to be paid to said United States of America, for the payment of which well and truly to be made, we bind ourselves and our respective heirs, executors and administrators, jointly and severally, by these presents.

THE CONDITION of this obligation is such, that

WHEREAS the above named principal has taken an appeal from the District Court of the United States in and for the District and Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decision made, rendered and filed in the above entitled cause on the 1st day of December, A. D. 1932.

NOW, THEREFORE, if the above-named principal shall prosecute his appeal to effect and shall answer all costs, if he fails to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect. [63]

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this 6th day of December, A. D. 1932.

[Seal] (s) DANG NAM
[Seal] (s) FRANK NICHOLS
[Seal] (s) ED. TOWNSEND

Taken and acknowledged before me, as to said Principal, the day and year first above written, at Wailuku, Maui, T. H.

[Notarial Seal] (s) MANUEL ASUE
A United States Commissioner in and for the Territory and District of Hawaii, and Notary Public, 2nd Judicial Circuit, Territory of Hawaii.

Taken and acknowledged before me, as to said sureties, on this 21st day of December, 1932.

[Seal] (s) THOS. P. CUMMINS
Deputy Clerk, U. S. District Court, District of Hawaii.

The foregoing bond is approved as to form, amount and sufficiency of sureties.

Dated: Honolulu, T. H. this 24th day of December, 1932.

(s) EDWARD K. MASSEE
Judge, United States District Court in and for the District and Territory of Hawaii.

The foregoing bond is approved as to form.

(s) S. B. D. W.

United States District Attorney.

[Endorsed]: Filed Dec. 24, 1932. Wm. F. Thompson, Jr., Clerk. By Thos. P. Cummins, Deputy. [64]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America.—ss.

The President of the United States to the United States of America, and Sanford B. D. Wood, Esquire, its Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City and County of San Francisco, State of California, within thirty days from the date of this Writ, pursuant to an order allowing an appeal, filed in the Clerk's office of the United States District Court for the District and Territory of Hawaii, wherein Dang Nam is appellant and you are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court

of the United States of America, this 21st day of December, 1932.

EDWARD K. MASSEE,
Judge, United States District Court, District and Territory of Hawaii. [66]

Attest:

[Seal] WM. F. THOMPSON, JR.,
Clerk, United States District Court.

Received a copy of the within citation.

SANFORD B. D. WOOD,
United States Attorney.

Let the within citation issue.

EDWARD K. MASSEE,
Judge, United States District Court, District and Territory of Hawaii. [67]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Petition for writ of habeas corpus.
2. Order for issuance of writ of habeas corpus, writ and return of service.

3. Return of James B. Bryan to writ of habeas corpus.
4. Traverse to Return.
5. Decision of Court dismissing writ.
6. Judgment discharging writ of habeas corpus and remanding petitioner, filed December 3, 1932.
7. Petition for appeal.
8. Assignment of Errors.
9. Order Allowing Appeal.
10. Citation on Appeal.
11. All exhibits.
12. All minute entries in the above-entitled cause.
13. This praecipe.
14. Bond for costs on appeal.
15. Clerk's Certificate to Transcript. [69]

Said transcript to be prepared as required by law, and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, in the State of California, before the ..... day of ....., 19.....

Dated this 22 day of December, A. D. 1932.

DANG NAM, Petitioner-Appellant,
By (s) E. J. Botts
His Attorney.

[Endorsed]: Filed Dec. 22, 1932. Wm. F. Thompson Jr., Clerk. [70]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL.

The United States of America,
Territory of Hawaii.—ss.

I, WM. F. THOMPSON, JR., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages numbered from 1 to 70 inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office and I further certify that I am attaching hereto the original citation on appeal and that the costs of the foregoing transcript of record are $32.95 and that said amount has been paid to me by the appellants.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said court this 9th day of February, A. D. 1933.

[Seal] WM. S. THOMPSON, JR.
Clerk, U. S. District Court,
Territory of Hawaii.

[Endorsed]: No. 7302. United States Circuit Court of Appeals for the Ninth Circuit. Dang Nam, Appellant, vs. James B. Bryan, District Director of Immigration, Port of Honolulu, Territory of Hawaii, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed October 3, 1933.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7302

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

DANG NAM,
Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii

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BRIEF ON BEHALF OF APPELLANT

E. J. BOTTS, ESQ.,
Stangenwald Building,
Honolulu, T. H.
Attorney for Appellant.

Filed this.....day of....., 1934.

PAUL P. O'BRIEN, Clerk.

By....., Deputy Clerk.

HONOLULU STAR-BULLETIN, LTD.

INDEX

CITATIONS

No. 7302

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

DANG NAM,
Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii

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BRIEF ON BEHALF OF APPELLANT

I.

STATEMENT OF THE FACTS

This appeal presents no question of fact and only one question of law.

Dang Nam by habeas corpus is seeking relief from deportation under a warrant of the Secretary of Labor. He was indicted in Honolulu on two counts charging a

narcotic violation. (R. pp. 8-10.) The first count charged an offense against the Act of February 9, 1909 (Narcotic Drugs, Import and Export Act). The second count charged a violation of the Act of December 17, 1914 (Harrison Narcotic Act). A single transaction was claimed, but pleaded under both statutes. He entered a plea of guilty, was sentenced to six months on the second count and put on probation for three years on the first count. (R. p. 5.) In passing sentence the judge recommended against deportation, as authorized by Section 19 of the Immigration Act of 1917 (Section 155, Title VIII, U.S.C.). Notwithstanding this recommendation, proceedings were commenced by immigration officers for his deportation as the term of his imprisonment approached an end and habeas corpus was finally resorted to by appellant to be relieved from deportation. The trial court held, however, that its recommendation against deportation was without jurisdictional justification, that the Act of February 18, 1931, withdrew from the court the power given it under Section 19 of the Immigration Act of 1917 to stay deportation in deserving cases and remanded appellant to the immigration authorities. (R. pp. 53-57.)

This Act of February 18, 1931, reads as follows:

> "Any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this section) who, after February 18, 1931, shall be convicted and sentenced for violation of or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, ex-

> change, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in Sections 155 and 156 of this title."

It is in substance the same as the Act of May 26, 1922 (Section 175, Title XXI, U.S.C.: Narcotic Drugs, Import and Export Act) which reads as follows:

> "Any alien who at any time after his entry is convicted under section 174 of this title shall upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor be taken into custody and deported in accordance with the provisions of sections 155 and 156 of Title 8 or provisions of law hereafter enacted which are amendatory of or in substitution for such sections."

II.

ERRORS RELIED UPON

Three errors are assigned (R. pp. 60-61) but they may all be summarized in one for the purpose of this brief as follows:

> That the court erred in holding and deciding that the Act of February 18, 1931 (Section 156-A, Title VIII, U.S.C.) makes deportation mandatory where an alien (except a non-dealer addict) is convicted of a narcotic violation, and that the court is without power to stay deportation by appropriate recommendation, as authorized in Section 19, Immigration Act 1917 (Section 155, Title VIII, U.S.C.).

III.

ARGUMENT

The Immigration Act of 1917 (Title VIII, U.S.C.) contained two sections dealing with deportation of undesirable aliens. These sections are 19 and 20, now 155 and 156 of the U. S. Code. We will refer to them here by their original numbers. Section 19 designates the aliens who are subject to deportation, such as prostitutes, pimps, anarchists, etc., and aliens convicted within five years after entry of a crime involving moral turpitude and imprisonment for one year or more. The section also puts it within the power of the judge to stay deportation, based upon conviction of a crime, by recommending against deportation at the time of passing sentence or within thirty days thereafter.

The following section (Section 20) sets up the machinery or method of deporting an alien found in one of the classes mentioned in the preceding section.

As the law stood following the passage of the Immigration Act of 1917, an alien violating the narcotic laws could not be deported following conviction unless he was sentenced to imprisonment for a year or more, and unless the conviction occurred within five years of his entry. To remedy this situation, Congress passed the Act of May 26, 1922 (Narcotic Drugs, Import and Export Act), which we have quoted above and which authorized the deportation of an alien convicted under the Act without reference to any period of imprisonment, and without reference to

the date of his entry. The Act provided that he should be deported in accordance with the provisions of Sections 19 and 20 of the Immigration Act of 1917.

Soon after the passage of this Act, the question was presented in this court of whether Congress had withdrawn the power given the trial court under said Section 19 to stay deportation in case of violations under the Act of May 26, 1922. The first decision of this court on the subject was *In re Wong Ging,* 299 Fed. 289. The defendant in this case was convicted of violating said Act of May 26, 1922, and the court recommended against deportation, but it was contended the court was without power in the premises. On appeal this court held that by reference the Act of May 26, 1922, *adopted the whole of the provisions relative to deportation contained in said Sections 19 and 20 and that the trial court still retained intact its power to effectively recommend against deportation.*

Several years later this court passed again upon substantially the same situation in *Weedin vs. Moy Fat,* 8 F. (2d) 488, where it reiterated the views it expressed in *Re Wong Ging, supra,* and held that, if Congress had intended in the Act of May 26, 1922, to take away from courts power to prevent deportation in cases arising under it, no reference to Section 19 would have been made, as Section 20 contains all the procedural details necessary and there would have been no occasion to mention Section 19.

Precisely the same situation is presented in the case at bar. If the Act of February 18, 1931, had only intended,

by reference to said Sections 19 and 20 to prescribe the procedure for deportation, it would have had no occasion to refer to Section 19 for the only thing applicable to deportation in that section is the provision giving the court power to recommend against it.

The views expressed in the two previously quoted decisions of this court were made clearer in *Chung Que Fong vs. Nagle,* 15 F. (2d) 789, where this same Act of May 26, 1922, was under consideration. In this case, the court held that said Act adopted *all the provisions of Sections 19 and 20, which were not by express terms inconsistent therewith.* It was contended in this case that an alien narcotic offender could only be deported where the proceedings were commenced within five years of his admission, a contention at variance with the express language of the Act of May 26, 1922, and plainly untenable.

The only decision cited by the court construing the Act of February 18, 1931, is a District Court decision (Re *Conte Grande,* 53 F. (2d) 475) and is not in point here. About the same contention was made there as was made in the *Chung Que Fong Case, supra,* and with the same result.

It is the duty of courts in construing an act of Congress to give effect, as far as possible, to every word of the act. In declaring, as Congress did, that deportations under the Act of February 18, 1931, should be in the manner provided by Sections 19 and 20 of the Immigration Act of 1917, it must be held that Congress intended to make all pertinent provisions of said sections, not inconsistent with

the Act itself, applicable, including the provision which sets forth the manner in which deportation may be stayed by the trial judge.

It is fair to assume that had Congress intended to take from the courts the power they have enjoyed for so many years of staying deportation in deserving cases, it would have done so in no uncertain words. Congress must be presumed to have realized the humane and beneficial use courts from time to time have made of this power in preventing essential miscarriages of justice, which the sweeping and general terms of the Act could not deal with.

At the conclusion of his decision, the trial judge said that Congress in enacting the Act of February 18, 1931, did so with notice of the construction this court had placed on the companion Act of May 26, 1922, in relation to deportation under Sections 19 and 20 of the Immigration Act of 1917. This is hardly an argument to support the trial court's position; rather the contrary. For this court has held in the cited cases that if Congress had only intended to refer to the machinery or actual procedure for deportation, it would have mentioned only one of the two sections, to wit: Section 20, but having mentioned the other section, to wit: Section 19, it was the court's duty to apply all provisions thereof applicable, including the one which prescribes the manner in which the court may stay deportation in a particular case.

The Act of February 18, 1931, must be construed in *pari materia* with Sections 19 and 20 of the Immigration Act of 1917. (See *Gottlieb vs. Mahoning Valley Sanitary*

Dist., 50 Sup. Ct. 333, 281 U.S. 770, 74 L. Ed. 1177; 59 C.J. 1043.)

In its effect upon an individual the statute must be classed as penal and like other penal statutes should receive a construction favorable to the accused. (*Wallis vs. Tecchio,* 65 F. (2d) 250.)

It is respectfully submitted, that the decision of the trial court is erroneous and should be reversed and defendant discharged.

Respectfully submitted,

.....

E. J. BOTTS,
Attorney for Appellant.

No. 7302

IN THE

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For the Ninth Circuit

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JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,

Appellee.

APPELLANT'S ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 7302

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANG NAM,

Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,

Appellee.

APPELLANT'S ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant's answer to the petition for a rehearing herein, respectfully shows:

I.

Appellee's petition for a rehearing is prefaced with the assertion, made for the first time, that the appeal was not timely taken, and that therefore this court is without jurisdiction to entertain it. In support of the point reference is made by appellee to a rule of the

District Court of the United for the Territory of Hawaii. There are two answers to the point:

1. The rule relied upon is not incorporated in the record and the court cannot take judicial notice of its existence.

2. Even if the court could take judicial notice of the existence of the rule, a breach thereof would not affect jurisdiction.

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1. THE RULE RELIED UPON IS NOT INCORPORATED IN THE RECORD AND THE COURT CANNOT TAKE JUDICIAL NOTICE OF ITS EXISTENCE.

There is no record before the court incorporating the rule of the court below, and obviously statements contained in a petition for rehearing cannot operate as a substitute for a record. Under settled law a reviewing court will not take judicial notice of the rules of inferior courts. (*Gammon v. Ealey & Thompson,* 97 Cal. App. 452, 456, 457; *Sweeney v. Stanford,* 60 Cal. 363; 15 R. C. L. 1079.)

The court below clearly had jurisdiction to grant an appeal in habeas corpus proceedings, and the controlling presumption on appeal is that it acted within its jurisdiction. Appellee has not furnished a record or cited any statute which dispels that presumption, and the court cannot take judicial notice of the existence of a rule such as appellee asserts. It therefore follows that appellee's point respecting jurisdiction must fall for lack of foundation.

2. EVEN IF THE COURT COULD TAKE JUDICIAL NOTICE OF THE EXISTENCE OF THE RULE, A BREACH THEREOF WOULD NOT AFFECT JURISDICTION.

Appellee deems the decision of this court in *Bryan v. Fumio Arai,* 64 F. (2d) 954, as decisive on the question of jurisdiction, but the adequacy of the record to present the question was not therein discussed.

The effect to be given rules of court is a disputatious question on which the authorities in general are widely divergent in their conclusions. There is no divergence, however, in the decisions of the Supreme Court of the United States and its pronouncements are uniformly to the effect that the court which makes a rule may suspend its operation in a particular case (*United States v. Breitling,* 20 How. 252, 254), that rules limiting time are mere regulations of practice not affecting jurisdiction (*Abbott v. Brown,* 241 U. S. 606), and that no rule of court can enlarge or restrict jurisdiction (*Washington-Southern Nav. Co. v. Baltimore P. S. Co.,* 263 U. S. 629, 635, 636).

If the principles of law declared in the foregoing cases be applied to the present appeal, then it is plain that appellee's point respecting jurisdiction is wholly without merit.

II.

An extended answer to appellee's points on the merits would simply burden the court with a duplication of the arguments made in the briefs filed before submission of the case. The decision herein merely reflects an adherence to decisions previously rendered by this court and their application to the present case.

Appellee seeks to have the court change its opinion by directing its attention to debates in congress. If statements in a petition for rehearing as to what occurred during congressional debates is to be accepted as a substitute for a record, it is sufficient to say that "debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." (*United States v. Trans-Missouri Freight Ass'n,* 166 U. S. 290.)

It is therefore respectfully submitted that the petition for a rehearing should be denied.

Dated, San Francisco, California,
April 26, 1935.

E. J. Botts,
Attorney for Appellant.

Herbert Chamberlin,
Of Counsel.

No. 7302

12

United States Circuit Court of Appeals

For the Ninth Circuit

DANG NAM,

Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,

Appellee.

PETITION FOR REHEARING.

INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii.

WILLSON C. MOORE,
Assistant United States Attorney,
District of Hawaii.

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U. S. Department of Labor,
Immigration and Naturalization
Service, Honolulu, T. H.

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JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,

Appellee.

PETITION FOR REHEARING.

To the United States Circuit Court of Appeals for the Ninth Circuit, and the Judges Thereof:

Comes now W. G. Strench, successor to James B. Bryan, District Director of Immigration and Naturalization at the Port of Honolulu, Territory of Hawaii, appellee in the above entitled cause, by and through INGRAM M. STAINBACK, United States Attorney for the District of Hawaii, as successor counsel to the former United States Attorney whose appearance has heretofore been entered herein, and presents this, his petition for a rehearing of the above-

entitled cause, in which judgment was rendered by this Court on December 21, 1934, reversing the judgment of the District Court of the United States for the District of Hawaii, and wherein extension of time has been granted in which to make this application; and for grounds thereof respectfully shows:

I.

That this Court is without jurisdiction to entertain the appeal herein, and to consider on the merits the original final order of the District Court of the United States for the District of Hawaii ordering deportation of the appellant, made and entered on December 3, 1932 (R. 2, 59; T. 54), because the petition for allowance of appeal was presented and the appeal perfected on December 21, 1932 (R. 3, 60; T. 56), not within the ten (10) days provided by Rule 126 of the District Court of the United States for the District of Hawaii.

This rule of the above Court, adopted on January 31, 1918, is now and ever has been continuously in effect, and wholly unamended; it is set forth at Page 841, Volume 4, Reports of the United States District Court for the District of Hawaii, and provides in respect of appeals in habeas corpus proceedings:

> "The transcript of the petition, writ of habeas corpus, return thereto, pleading, motions, evidence, and proceedings and orders therein shall be presented for allowance and the appeal perfected within 10 days after the final decision is rendered."

The force and effect of this rule of court was considered by this Court in 1933, in a case of the original appellee herein v. Fumio Arai, 64 F. (2d) 954, as follows:

> "Appellee's contention, in which we concur, is that since the petition for allowance of appeal was presented and the appeal perfected, not within the 10 days provided by Rule 126 of the Hawaiian court * * * this court cannot entertain the appeal."

Your petitioner notes, with apology to this Honorable Court, that this point was not directed to the attention of the Court in the brief heretofore filed by former counsel for the appellee, but avers that since "it is the duty of federal appellate courts, in every case, to examine its jurisdiction, whether such point has been raised or not" (*Bremmer v. Thomas*, Eighth Circuit Court of Appeals, 1928, 25 F. (2d) 301), this Court may and will, at this time, although after decision on the merits, take notice of the want of jurisdiction herein, and correct this inadvertence.

Your petitioner submits that it is clear that in the first instance, despite appellee's omission, it was the duty of the Court to inquire as to its jurisdiction, even though the question related merely to procedural steps. Thus, as in *Bremmer v. Thomas* above:

> "As the petition for appeal and assignment of errors were filed more than three months after the entry of the order from which the appeal is taken, and as this matter is jurisdictional, the

entitled cause, in which judgment was rendered by this Court on December 21, 1934, reversing the judgment of the District Court of the United States for the District of Hawaii, and wherein extension of time has been granted in which to make this application; and for grounds thereof respectfully shows:

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Your petitioner submits that it is clear that in the first instance, despite appellee's omission, it was the duty of the Court to inquire as to its jurisdiction, even though the question related merely to procedural steps. Thus, as in *Bremner v. Thomas* above:

> "As the petition for appeal and assignment of errors were filed more than three months after the entry of the order from which the appeal is taken, and as this matter is jurisdictional, the

> appeal must be dismissed for want of jurisdiction because not taken within the time required by law."

A similar conclusion of the Eighth Circuit was entered in the case of *Cleveland Cliffs Iron Co. v. Village of Kinney* (1920), 266 Fed. 288. The Seventh Circuit, in 1934, in the case of *Perlman v. Burdick,* 68 F. (2d) 729, observed:

> "Although the appellee did not raise the question as to the improper method of taking the appeal, it is the duty of this court to inquire sua sponte as to its jurisdiction."

In an immigration proceeding, the Seventh Circuit had earlier held:

> "A question of jurisdiction, though not raised by either party, cannot be ignored."
>
> *Smith, District Director of Immigration v. U. S. ex rel. Gorlo,* 52 F. (2d) 848.

Nor can jurisdiction to determine an appeal be conferred by the parties' consent: *Satterlee v. Harris,* Tenth Circuit, 1932, 60 F. (2d) 490.

Consistent with the above position announced by the Seventh, Eighth and Tenth Circuits, your petitioner avers that the clear authority on this point is further observed in the decisions noted by the Second Circuit (*In re Torgovnich* (1931), 49 F. (2d) 211; *Cory Bros. Co. v. U. S.* (1931), 47 F. (2d) 607); the Third Circuit (*Garvin v. Kogler* (1921), 272 Fed. 442); the Fourth Circuit (*Osborn v. U. S.* (1931), 50 F. (2d) 712); the Sixth Circuit (*Republic Iron and*

Steel Co. v. Youngstown Sheet and Tube Co. (1921), 272 Fed. 386); The Circuit Court of Appeals for Porto Rico (*Diez v. Green* (1920), 266 Fed. 890); and the Court of Appeals, District of Columbia (*Trans-Atlantic Trust Co. v. Pagenstecher* (1923), 287 Fed. 1019).

It follows, if this Court should have found in the first instance that it was without jurisdiction, despite the inadvertence of appellee herein, that it now will, upon rehearing, before entry of the mandate upon the judgment heretofore made, do what the law requires and recall the heretofore unauthorized consideration of the merits of the instant controversy, holding the appeal for naught and without the jurisdiction of this Court.

II.

Failing this, and in the alternative, your petitioner respectfully shows the following points upon the merits of the question of statutory construction considered herein, not heretofore adverted to, feeling also that if the Court is disposed thereby to question the validity of the conclusion heretofore entered, the more reason will appear for the granting of the first noted above grounds for dismissal of this appeal:

1. It was the *intention* and *belief* of Congress in enacting the act of February 18, 1931 (46 Stat. 1171, 8 U. S. C. A. 156a) to provide for the deportation of each and every alien peddler or dealer (excluding non-dealer addicts), convicted under the Harrison Narcotic Act, without limitation or control by judicial recommendation against such deportation. It is sub-

mitted that the bill was passed to rid the country of aliens engaged in the drug traffic. It was not contemplated that any clemency would or should be extended to this class of law violators. It is submitted that this clearly appears from the Senate Report, No. 1443, of February 2, 1931, upon H. R. 3394, wherein the Senate Committee quotes with approval the following language from House Report No. 1373 of May 2, 1930:

> "The flow of dangerous habit-forming illicit narcotics from the factories of Europe continue to seep into the life blood of the American people, bringing misery, disease, and crime in its wake. The main purpose of the bill is to permit the Government to deport the alien smugglers and those aliens higher up in the big international ring who are worse than murderers. *Every available weapon of enforcement and of law must be put to work to combat these human fiends* who would destroy for the sake of greed the happiness of the American people. *Deportation is a proper and effective weapon* against aliens who violate our laws and release the United States from the cost of maintaining them in our already crowded jails." (Italics supplied.)

It is but mockery of this legislative language to graft upon this bill drawn with these purposes and ends in view the qualification that any sentencing magistrate may recommend against the deportation of aliens so convicted.

2. The bill, as H. R. 3394, reported out of the House committee on May 2, 1930, was originally en-

titled, "An act to amend Section 19 of the act of February 5, 1917". The Senate amended the title to read, "A Bill to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics". (Senate Journal, February 10, 1931, Cong. Rec. p. 4486). This amendment is in harmony with the true and larger purposes of the Act which became the law of February 18, 1931.

3. When the House passed H. R. 3394, on June 9, 1930, Cong. Rec. p. 12453, the law provided for the deportation of such aliens who "violate or conspire to violate" the narcotic acts. It did not require a *conviction* or *sentence*. Thus, as originally drawn, the act did not contemplate any judicial recommendation or judicial action whatsoever in affixing the liability to deportation. Also, as originally drawn, the act did not exempt addicts. Thus Congressman Stafford, at page 10324, Congressional Record, on May 2, 1930, addressed to Congressman Fish, who reported the bill from committee, this question:

> "Mr. Stafford: Do I understand it is the purpose of the gentleman from New York to deport every narcotic addict and every user of opium in case he happens to be an alien?
>
> "Mr. Fish: The gentleman is correct."

Again, on July 2, 1930, at page 12367, Cong. Rec., the all-inclusive nature of the intended legislation was again attacked by Congressman Stafford as follows:

> "I stated in private conversation with the gentleman from New York that the bill should be framed so as to be limited to dealers and

> peddlers. As pointed out by the gentleman from New York, I also stated that there might be an individual who happened to use opium once but who was not an addict, and yet he would be deportable. It is inconceivable to me that any committee would report a bill of this drastic character which would deport addicts just because they are aliens. I think this bill should go over until tomorrow."

The point is this: At no time in the discussion of the bill when its unlimited application was being attacked, was it intimated by the committee framers that the reference in the bill to Section 19 of the act of February 5, 1917 operated to require or permit a judicial election for or against deportation. If it had been intended that the bill did so provide, here, of all times it would have been mentioned as an answer to the attacks made upon the wide scope of the measure.

Thus the bill was reported out of the House, restricted to non-addicts unless the same were dealers or peddlers, and providing for deportation "in the manner provided by Sections 19 and 20 of the Act of February 5, 1917" of aliens who "violate or conspire to violate" the various narcotic acts. The Senate on February 14, 1931, Cong. Rec. 4935 amended this last clause to apply to any alien "convicted and sentenced for violation of or conspiracy to violate", etc. Of this amendment Congressman Vincent of Michigan said in the House on February 14, 1931, when the Senate amendment was agreed to (P. 4936, Cong. Rec.):

> "The only important amendment in the bill was one which requires conviction and sentence while

> the House bill only required that the man be found guilty of having done the various things stated in the bill."

Therefore it affirmatively appears with reference to this legislation that it was ultimately passed by the House on the theory that it was changed from the original measure only by requiring a conviction and sentence, rather than a "violation".

Manifestly, this Court's argument in the closing paragraph of its decision based on the theory that "deportation is not because of the commission of a crime" could not apply to the original House measure. For that is precisely the basis originally intended for liability to deportation under the act of February 18, 1931. And it follows, if this is true, that the House did not understand that the effect of the Senate amendment, by reason of requiring a conviction, also made possible a judicial recommendation against deportation.

4. In short, the whole course of this legislation shows no disposition nor intention to adopt any of the substantive considerations of Section 19 of the act of February 5, 1917, regarding the deportation of that execrable, detestable, and verminous criminal, the dope dealer or peddler. To him no clemency was to be extended. The substantive provisions of Section 19 regarding convicted aliens, are five:

> First, the conviction must occur within five years of the alien's entry into the United States.

Second, the conviction must be for a crime involving moral turpitude.

Third, the sentence must be for the term of one year or more.

Fourth, the deportation may occur at any time after entry in the event of the conviction of two or more such offenses.

Fifth, the sentencing court may at the time of sentence recommend against deportation.

It is true the procedural provisions in Section 19 in respect of such deportation are limited to one only; but it is the initiatory and all-important step. It provides (at the end of the first sentence of Section 19 after eleven (11) semi-colons) for the arrest and custody of the deportee upon warrant of the Secretary of Labor. But it is emphasized that such procedural provision, respecting the "manner" of deportation, does most importantly appear in Section 19.

It is submitted that if this Court is going to subject the act of February 18, 1931 to *all* the *substantive* provisions, and not just the *procedural* provision of Section 19, it is apparent that in any event the violation involved in this case on the part of Dang Nam was not within the original requirements wherein a judicial recommendation would lie.

First, it was not a sentence for a year or more, but only for six months, and therefore, either no deportation will lie whatsoever (as this Court held in *Weedin v. Moy Fat,* 1925, 8 F. (2d) 489, construing the cognate act of May 26, 1922), or else if the latter

act of 1931 be held to overcome the earlier requirement (as this Court held regarding the five-year provision in *Chung Que Fong v. Nagle,* 1926, 15 F. (2d) 789, also construing the Act of 1922), then it is not a case for which judicial recommendation is provided. This last conclusion was the view of the Fifth Circuit in *Rodriguez v. Campbell,* 1925, 8 F. (2d) 983.

Again, this was not a conviction within five years of the defendant's entry. Therefore, does the act of February 18, 1931 warrant his deportation in any event?

The purpose of this argument is to point out that if this Court adopts as essential to the act of February 18, 1931, *all* the *five* substantive provisions of Section 19, the act thus is stretched out of all semblance to agreement with Congressional intent. It is submitted that Congress did *not intend* to require a sentence of a year or more with reference to the alien violators of narcotic acts. It did *not* intend to limit deportation to crimes involving moral turpitude. It did *not* intend to limit the act to aliens who had been here less than five years, nor require two convictions of those aliens who had lived here beyond five years. But if the substantive provision regarding judicial recommendations is to be enforced by this Court, how can it escape enforcing the remaining four substantive provisions? If this view is adopted, the act is entirely emasculated, and indeed is nullified as the District Court for the Southern District of New York observed in *The Conte Grand—U. S. ex rel Magri v. Wixon,* 1931, 53 F. (2d) 475. Admittedly, the *sine qua non* of statutory construc-

tion is to enforce legislative intent. When this can be done without violence to language, it is imperative to do so.

5. Your petitioner submits that the narrower and restrictive application of the phrase "in the manner provided by" does not do violence to the express language of the act, nor to the legislative purpose. The Committee on Immigration and Naturalization in the House of Representatives may reasonably be regarded to have had knowledge that the expression "in accordance with the provisions of Sections 19 and 20," used in the act of 1922, had in the reported decisions been held to "adopt the whole of the provisions relative to deportation contained in those sections" (Circuit Judge Gilbert in *Hampton v. Wong Ging,* 1924, 299 Fed. 289).

"Accordance" means, per Webster's Dictionary, "agreement; harmony; concord; conformity." It is submitted that such language *is broad enough* to include the substantive, as well as the procedural provisions of Section 19.

The word "manner" is usually defined, says the American and English Encyclopedia of Law, 2nd ed., p. 918, as "meaning way of performing or exercising * * * The derivation of the word is from the Latin *manus,* the hand. Manner is literally the handling of a thing, and embraces both method and mode". Webster says: "manner: a way of acting, a mode of procedure; the mode or method in which something is done". It is submitted that the language of the act of 1931 is *narrow enough* to exclude the substantive

and include only the procedural provisions of section 19. When it is considered that the framers of this legislation departed from the earlier phrase of the act of 1922, and used a more restrictive phrasing in the act of 1931, the conclusion urged by your petitioner seems inescapable.

Coupled with this, when the broad scope of Congress' intent in this legislation is kept in mind, it becomes almost imperative that this Court, in order to enforce the legislative will, must give the reference to section 19 only the effect of specifying the procedural provision and not those of substantive character.

6. It should not be lost sight of that the Act of May 26, 1922, of itself made provision that the deportee should be taken into custody upon warrant issued by the Secretary of Labor. *The Act of February 18, 1931, is silent on this point.* Thus, while Section 19 of the Act of 1917 does most emphatically contain a procedural provision in this respect regarding deportation (Judge Kerrigan erred in *U. S. v. George Wing,* 1925, 6 F. (2d) 896 in stating that Section 19 does *not* contain any provision as to the manner and procedure on deportation; and this error was repeated by this Court in *Weedin v. Moy Fat.* above; and perpetrated by appellant's counsel again in his Brief, pgs. 6, 7) it is still true that in the Act of 1922 no procedural provision of Section 19 remained to be incorporated by reference. But that is not true of the Act of February 18, 1931. An important procedural provision does remain to be in-

corporated into the Act of 1931 from Section 19. It is the initiatory and all-important step; it is the manner of placing the deportee in the custody of the Secretary of Labor. This radical difference between the two acts makes impossible a decision here based on the logic which appealed to District Judge Kerrigan and Circuit Judge Gilbert in the cases noted. Thus, in the instant legislation a reason does exist for referring to Section 19, in order to invoke the procedural provision noted, without leaving room for the assumption, formerly argued regarding the Act of 1922, that Congress' *only purpose* in referring to Section 19 was to invoke the provision regarding judicial recommendation.

III.

Lastly, your petitioner is not oblivious to the considerations of individual justice involved in this case. While this appellant is rendered deportable upon a plea of guilty, there is no indication that he had an alternative. There is no indication that the prime motive in so pleading was an indicated recommendation against deportation, or that, had he stood trial, the result would have been otherwise. (Statement of Narcotic Agent, R. 50, and Examination of Appellant, R. 44-48). The case against this appellant appears to have afforded no alternative. Therefore, it is not the case, as erroneously claimed by appellant in the last paragraph of his Brief, that this statute must be classed as penal and should receive a construction favorable to him. Rather, the plain mandate of the

Supreme Court is that while deportation may be burdensome and severe for the alien, it is not a punishment, and the rules of criminal law are not applicable; *Mahler v. Ebey,* 1924, 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

WHEREFORE, upon the grounds stated it is respectfully urged that this petition for a rehearing be granted; and that upon the ground first stated this appeal be dismissed; and failing this, that upon the remaining grounds urged the judgment of this Court be upon further consideration reversed.

Dated, this 2nd day of February, A. D. 1935.

INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii.

WILLSON C. MOORE,
Assistant United States Attorney,
District of Hawaii.

ERNEST J. HOVER,
U. S. Department of Labor,
Immigration and Naturalization
Service, Honolulu, T. H.
Attorneys for Appellee.

Certificate.

I, INGRAM M. STAINBACK, United States Attorney for the District of Hawaii, counsel for appellee herein, certify that the foregoing petition for rehearing is not presented for the purpose of delay or vexation; but is in my opinion well-founded in the law and the facts, and proper to be filed herein.

INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii.

Service.

Receipt of a copy of the within Petition for Rehearing is hereby acknowledged this 2 day of February, 1935.

E. J. BOTTS,
Attorney for Appellant.

No. 7302

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANG NAM,
Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,
Appellee.

Upon Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

SANFORD B. D. WOOD,
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District of Hawaii,

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H. H. MCPIKE,
United States Attorney,
Attorneys for Appellee.

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Index

Citations

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Upon Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE

This case comes on appeal from an order of the United States District Court for the Territory of Hawaii entered December 1, 1932, discharging the writ of habeas corpus and remanding the petitioner Dang Nam to James B. Bryan, District Director of Immigration at the Port of Honolulu, Territory of Hawaii, now succeeded by W. G. Strench, District Director of Immigration at the Port of Honolulu.

Dang Nam was indicted in Honolulu charging in count one a violation of the Act of February 9, 1909, (The Narcotic Drugs Import and Export Act), and in count two a violation of the Act of December 17, 1914, (Harrison Narcotic Act). (R. pp. 8-10). On April 18, 1932, the defendant entered a plea of guilty to both counts. On count one, sentence was suspended and he was placed on probation for three years, and on count two he was sentenced to six months' imprisonment. The Judge, in sentencing the defendant, recommended against deportation, as authorized by Section 19 of the Immigration Act of February 5, 1917 (8 U.S.C.A. Sec. 155).

On June 29, 1932, the Secretary of Labor directed to the District Director of Immigration, at Honolulu, Territory of Hawaii, a warrant for the arrest of the alien Dang Nam, reciting his then presence in the United States, a violation of the Immigration Act of February 18, 1931 (8 U. S. C. A. Sec. 156 (a)) (R. pp. 42-43). Appelant then resorted to a petition for a writ of habeas corpus to be relieved from deportation (R. pp. 4-7). The trial court held that its prior recommendation against deportation at the time of passing sentence was without legal justification and void, since the Act of February 18, 1931 (8 U.S.C.A. Sec. 156 (a)) was mandatory in its provision and deprived the court of the authority vested in it by Section 19 of the Immigration Act of February 5, 1917 (8 U.S.C.A. Sec. 155), and remanded appellant to the immigration authorities.

II.

ARGUMENT.

In representing this appeal to the court, the appellant has summarized his three assignments of error (R. pp. 60-61) into one question of law, within which summarization, for the purposes of this appeal, the appellee shall confine himself.

The alleged error appealed from being:

That the court erred in deciding that the provision of the Act of February 18, 1931 (8 U.S.C.A. Sec. 156 (a)) makes deportation of an alien (except a non-dealing addict) mandatory after conviction and sentence.

The Act of February 18, 1931 (46 Stat. 1171, 8 U.S.C.A. 156 (a)) provides as follows:

> "Any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this section) who, after February 18, 1931, shall be convicted and sentenced for violation of or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in sections 155 and 156 of this title. (Feb. 18, 1931, c. 224, 46 Stat. 1171.) * * * 'An act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics.' "

The argument is made by appellant that since this act of February 18, 1931, employs the phrase "in manner provided in sections 155 and 156 of this title", which is a change from the phrase "in accordance with Sections 19 and 20 of the Act of February 5, 1917" found in the preceding narcotic act of May 26, 1922 (42 Stat. 596), that the recommendation of the Judge passing sentence supercedes the proviso "in manner provided in sections 155 and 156 of this title." In short, the contention of the appellant is that that portion of section 19 of the Act of 1917,

> "That the provision of this act respecting deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act".

applies in the instant case.

The quotation from Section 19 relates only to recommendations of the courts in cases of crime involving moral turpitude, and, read alone, appears not applicable to crimes under the Federal narcotic laws as they are held not to include that element. *Andreacchi v. Curran,* (D. C. S. D. N. Y.) 38 Fed. (2d) 498. However, the question cannot be disposed of on those facts.

In *Hampton v. Wong Ging and Wong Dick,* (C.C.A 9) 299 Fed. 289, the contention was that the defendants were not subject to deportation for the reason that the *supra* quoted provision of Section 19 of the Act of 1917 did not apply in that it dealt only with crimes involving moral turpitude. The court stated, referring to the Narcotic Act of 1922:

> "We think there can be no doubt that the later act, which provides that an alien convicted thereunder shall be taken into custody and deported 'in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917', adopts the whole of the provisions relative to deportation contained in those sections, and that the present cases are controlled by section 19."

The same question was raised in *United States v. George Wing,* (D.C.D. Nev.) 6 Fed. (2d) 896, in which the above decision was expressly approved. The court stating that the question to be decided was: "What did Congress intend by the phrase 'in accordance with sections 19 and 20'?" In reply to the query the court further stated:

> "* * * the deportation must be 'in accordance with' the provisions of section 19, as well as with section 20. Section 19 does not contain any provision as to the manner and procedure on deportation; such provisions are contained in section 20. There is only one clause in section 19 which could in any possible way limit, qualify, or define the right to deport for violations of the act of 1922, and that is the 'recommendation' clause."

In *Weedin v. Moy Fat* (C.C.A. 9) 8 Fed. (2d) 488, the Circuit Court of Appeals, after pointing out that the Narcotic Act of May, 1922, provided that an alien subject to deportation under the act shall:

> "* * * 'be taken into custody and be deported in accordance with the provisions of sections 19 and 20 of the Act of February 5, 1917, * * *' ".

held that deportation proceedings for a conviction under the said Narcotic Act of 1922 were subject to that language in Section 19 of the Immigration Act of 1917, which provides for deportation on the ground of sentence:

> "* * * 'to imprisonment for a term of one year or more because of conviction in this country of any crime involving moral turpitude.' "

and that therefore an alien who had been sentenced to but two months' imprisonment under that Narcotic Act could not be deported.

In opposition to that view the suggestion was made to the court

> "* * * that the Act of May 26, 1922, in adopting sections 19 and 20 of the prior Act, was intended to prescribe only the manner of taking into custody and the manner of deportation, * * *"

In regard thereto the court said it thought the intention was more inclusive, and was to limit "the authority to deport." The court said:

> "Section 19 contains no provision whatever concerning procedure or the manner of deportation. If it was the intention of the later act to adopt only the manner of deportation prescribed in the act of 1917, there was no occasion to refer to section 19."

The courts, in each of the above quoted cases, quote the provision "in accordance with sections 19 and 20." The reasoning of the courts in the above quoted decisions is not vitiated in the statements that the language in the former Narcotic Act providing for deportation "in accordance with sections 19 and 20" of the Act of 1917 relates to the right to *deport* and not merely to the *manner* of deportation.

The fact that the Narcotic Act of 1922 provides for deportation "in accordance with Sections 19 and 20" of the Immigration Act of 1917, whereas the later Narcotic Act provides for deportation "in the manner provided" in those sections of the 1917 Act presents a question similar to that before the Supreme Court in *Bugajewitz v. Adams,* 228 U. S. 585, involving the effect of the difference in language between Section 3 of the Immigration Act of February 20, 1907 (34 Stat. 898, 899) and that section as amended by the Immigration Act of March 26, 1910 (36 Stat. 263, 264). Section 3 of the 1907 Act provided that any alien woman found practicing prostitution within three years after entering the United States was to be deported "as provided by sections 20 and 21 of this act." That section of the 1907 Act was amended by

the Act of 1910 by striking out the limitation of three years and ordering deportation "in the manner provided by" Sections 20 and 21. The beginning of those two sections provided for the taking into custody of aliens subject to removal, within three years from entry, and it was argued that the three-year limitation was still in effect. The Supreme Court in that case said:

> "We are of opinion that the effect of striking out the three-year clause from section 3 is not changed by the reference to sections 20 and 21. The change in the phraseology of the reference indicates the narrowed purpose. The prostitute is to be deported, not 'as provided' but 'in the manner provided' in Sections 20, 21. Those sections provide the means for securing deportation, and it still was proper to point to them for that. *United States v. Weis,* 181 Fed. Rep. 860; *Chomel v. United States,* 192 Fed. Rep. 117."

In addition to the fact that the Supreme Court has ruled that the phrase "in the manner provided" is narrower that the phrase "as provided" and relates to the means of securing deportation, it must be recalled that the other decisions of the courts discussed above held that the phrase "in accordance with sections 19 and 20" relates to the right to deport as well as to the manner of deportation. Those facts require that the act under which the instant case was instituted, which provides for deportation "in the manner provided in section 19 and 20 of the Act of February 5, 1917" be regarded as employing that phrase as re-

lating to "manner" and not to right of deportation, unless the whole of that Narcotic Act contains some language requiring the construction that the phrase "in the manner provided" relates to the right to deport as well as the manner of deportation. No language in that act requires that that phrase be considered to relate to the right of deportation. On the contrary, another difference between the language of that act and that of the earlier Narcotic Act further indicates that that phrase relates only to manner of deportation. The difference of language and its effects should be pointed out. That language of the earlier Narcotic Act of 1922, with respect to deportation for certain violations of the Narcotic laws, reads:

> "Any alien who at any time after his entry is convicted."

In that connection it is to be recalled that that act provided that such alien shall be deported "in accordance with the provisions of Sections 19 and 20" of the Immigration Act of 1917. In *United States ex rel. Grimaldi v. Ebey, District Director of Immigration,* (C.C.A. 7) 12 Fed. (2d) 922, the question was whether an alien was subject to deportation under that act who was arrested more than five years after his arrival in this country. On his part it was contended that the language "any alien who at any time after his entry is convicted" was modified and controlled by the reference to Sections 19 and 20 of the Immigration Act of 1917, which fixes a five-year limitation period in certain cases. The court held that the language "at

any time after his entry'' in the Narcotic Act of 1922 controlled over any limitation found in Section 19 of the Act of 1917. However, that language, ''any alien who at any time after his entry,'' is not employed in the latter Narcotic Act under which the deportation proceeding was instituted in the present case, as that act relates only to ''any alien * * * who after the enactment of this act shall be convicted and sentenced'' with certain exceptions. The clause ''after the enactment of this act'' can hardly mean more than that the act is to apply solely to convictions and sentences arising after its enactment. Hence, deportation proceedings under that act are subject to the five-year limitation in section 19 if the language in that Narcotic Act reading ''in the manner provided'' in sections 19 and 20 included the provisions in section 19 relating to the right to deport as well as to the manner of deportation. The fact that Congress in the later act did not use the phrase ''at any time after his entry'' but changed the language from ''in accordance with the provisions of'' sections 19 and 20 to ''in the manner provided'' in those sections indicates that it was the intention of Congress for the last-mentioned phrase not to include the provisions of those sections relating to time limitations, or other provisions of that section relating to right of deportation. So the phrase must be held to include only those provisions relating to manner of deportation. Therefore, a recommendation of the court against deportation, being a provision relating to right of deportation, has no application to convictions and sentences of the class described in the

Narcotic Act of February 18, 1931, involved in the instant case.

In *The Conte Grande,* (D. C. S. D. N. Y.) 53 Fed. (2d) 475, the court, in interpreting the Act of February 18, 1931, stated:

> "This statute further provides that the deportation shall be 'in the manner provided in sections 19 and 20' of the Immigration Act of 1917 (8 U. S. C. A. secs. 155, 156). Counsel for the alien argues that by reason of the reference to these parts of the act of 1917, there can be no lawful deportation except for a cause and under conditions specified in sections 19 and 20 of the 1917 act. So to construe the new statute would nullify it. It is therein expressly provided that the 'manner' of the deportation shall be in accord with the provisions of the older statute. Sections 19 and 20 of the 1917 act (8 U.S.C.A. secs. 155, 156) prescribe what the manner of a deportation thereunder shall be. It is only to the extent of the manner thereby prescribed that the 1931 act requires that they be complied with. For this reason the court decisions cited by counsel as to the conditions of deportation under sections 19 and 20, as they existed previous to the Act of February 18, 1931, are not of assistance and have no pertinency here".

Appellant further contends that if Congress intended by the Act of February 18, 1931, to deprive the courts of their heretofore enjoyed power of staying deportation, that it would have done so in express terms. An examination of the Congressional Record

under date of February 10, 1931 (Record p. 4562) discloses that the title was amended in the Senate to read: "A Bill to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics." The amendment was agreed to by the House, February 14, 1931, (Record p. 5028), which title the Act now bears. Congress, in enacting the Act of February 18, 1931, did so with knowledge of the interpretation placed upon the words by the Ninth Circuit Court of Appeals, "upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of", and when Congress approved the wording in the phrase "be taken into custody and deported in manner provided in sections 155 and 156 of this title" it meant what it had expressly provided, that is to adopt only such parts of sections 19 and 20 as provided the *manner* of taking into custody and the *manner* of deporting.

It is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

SANFORD B. D. WOOD,
United States Attorney,
District of Hawaii,

By ED. TOWSE, *Assistant,*

H. H. MCPIKE,
United States Attorney,

Received from the Appellee July 2, 1934, a copy of the foregoing Brief.

E. J. BOTTS,
Attorney for Appellant.

No. 7322

United States

Circuit Court of Appeals

For the Ninth Circuit.

LEO A. MADDEN, Ancillary Receiver of Piggly Wiggly Yuma Company, a corporation,

Appellant,

vs.

MORRIS LaCOFSKE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona.

Parker Printing Company, 545 Sansome Street, San Francisco.

No. 7322

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

ATTORNEYS OF RECORD

TOWNSEND, JENCKES and EDWARDS,
Luhrs Tower, Phoenix, Arizona,
Attorneys for Appellant.

MARKS and MARKS,
Title and Trust Building, Phoenix, Arizona,
Attorneys for Appellee. [3*]

In the United States District Court in and for the District of Arizona.

In Equity
No. E-244—Phoenix

CRAMER'S BAKERY, INC., LTD., a corporation; IMPERIAL VALLEY MILK PRODUCERS ASSOCIATION, a corporation; VALLEY WHOLESALE MEAT COMPANY, a corporation; and HAROLD W. HERLIHY, as Receiver of U-SAVE HOLDING CORPORATION, a corporation,

Complainants,

vs.

PIGGLY WIGGLY YUMA COMPANY, a corporation,

Defendant.

PETITION FOR ORDER AUTHORIZING SALE OF PROPERTY.

The petition of Leo A. Madden respectfully shows:

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

I.

Your petitioner was, on the 12th day of March, 1932, duly appointed Receiver of Piggly Wiggly Yuma Company, a corporation, by the United States District Court for the Southern District of California, in an action therein pending, wherein the above named complainants were the petitioners and the Piggly Wiggly Yuma Company, a corporation, was defendant; that on the same day your petitioner qualified as said Receiver, and ever since has been, and now is, the duly appointed, acting and qualified Receiver of said corporation.

II.

Thereafter and on the 14th day of March, 1932, your petitioner was appointed Ancillary Receiver, by the United States District Court in and for the District of Arizona, in the above entitled cause; that your petitioner forthwith qualified, and ever since has been, and now is, the duly appointed, acting and qualified Receiver of said defendant corporation.

III.

That said defendant corporation is the owner of the fixtures and the stock of merchandise in the store located at 258-260 Main Street, Yuma, Arizona, known as "Piggly Wiggly Store No. 1," and that your petitioner, ever since the date of his appointment and qualification herein, has been, and now is, operating and conducting said store; that

the premises upon which [4] said store is situated, are covered by two leases, expiring February 18th, 1934, and October 6th, 1934, respectively, and that the combined monthly rental due under the terms of said leases is $350.00 per month.

IV.

That at the time of the appointment of your Receiver herein, the defendant Piggly Wiggly Yuma Company was operating seven stores, and that all of said stores have been disposed of except a store at Brawley, California, and the said Yuma store. Your Receiver is making every effort to dispose of said Brawley store, and to wind up the affairs of this receivership.

V.

That since his appointment as Receiver, your petitioner has at all times been and is now operating said Yuma store at a loss, and that it is for the best interest of the creditors and stockholders of said Piggly Wiggly Yuma Company that said store be disposed of at the earliest possible date. That the United States District Court in and for the Southern District of California has heretofore authorized your petitioner to sell all of the defendant's stores in block, but that your petitioner was unable to secure a bid for them in such block, and has been compelled to sell them out as individual stores.

VI.

That since July 1, 1932, your petitioner has exhausted every possible means to find a purchaser for said Yuma store, and has been able to obtain only one bid for the stock of merchandise and fixtures of said store. That Herman J. Schwartz and Jessie E. Schwartz, of Yuma, Arizona, have made such bid, and the same is attached hereto, and marked "Exhibit 'A' ". That said bid is for the sum of $2250.00 cash, lawful money of the United States, and was accompanied by a check to your petitioner in that amount. That the sum offered is not disproportionate to the value of said fixtures and the stock of merchandise.

That under the laws of the state of Arizona, your petitioner is informed and believes, and therefore alleges, that the landlord has a lien on all of said stock of merchandise and fixtures, for the unearned rent still to [5] accrue under the terms of the said leases. That the amount of rent to accrue under said leases far exceeds the value of said fixtures and stock of merchandise. That under the terms of said leases your petitioner has a right to assign the leasehold interest of the defendant, and that said bidders have agreed to accept such assignment.

VII.

That unless said offer is accepted, your petitioner verily believes and so alleges, that it will be necessary to dispose of the stock of said store by sale over the counter, and that such sale would be un-

desirable and unprofitable, for the reason that one of the chief factors in the loss incurred by your petitioner in operating said business was the heavy rental provided for by said leases. That if said offer is not accepted and it proves inadvisable for your petitioner to further continue the operation of said business, then and in such event the only alternative remaining to your petitioner would be to abandon said store to said landlord.

WHEREFORE, petitioner prays that the Honorable Court enter an order herein, without notice, authorizing said petitioner to accept said offer and to consummate said sale, and assign said leases.

Dated this 22nd day of November, 1932.

LEO A. MADDEN,
Receiver of the Piggly Wiggly
Yuma Company, a corporation.

FRED BLAIR TOWNSEND,
C. A. EDWARDS,
CHAS. B. WARD,
Attorneys for Receiver.

State of Arizona,
County of Maricopa.—ss.

C. A. EDWARDS, being duly sworn, on oath deposes and says: That he is one of the attorneys for Leo A. Madden, Receiver of the Piggly Wiggly Yuma Company, a corporation, defendant in the above entitled action, and that as such attorney he is acquainted with the facts contained in the fore-

going petition; that said petition is true of his own knowledge except as to those matters therein stated [6] upon his information and belief and as to those matters that he believes it to be true.

C. A. EDWARDS,

Subscribed and sworn to before me this 22nd day of November, 1932.

(Seal) FRED BLAIR TOWNSEND,
Notary Public in and for the County of Maricopa, State of Arizona. My Com Exp 2/16/36. [7]

EXHIBIT "A"

November 15, 1932.

Mr. Leo A. Madden,
Federal Receiver in Equity for
Piggly Wiggly Yuma Company,
El Centro, California.
Dear Sir:

We hereby offer you the sum of Twenty-two Hundred and Fifty ($2250.00) dollars for the Piggly Wiggly Yuma Store at 258-260 Main Street, Yuma, Arizona, including all stock and fixtures.

HERMAN J. SCHWARTZ
JESSIE E. SCHWARTZ

The foregoing bid is hereby accepted according to the terms thereof, subject to the approval of the

United States District Court and I hereby acknowledge receipt of said personal check.

LEO A. MADDEN
Leo A. Madden, Federal Receiver in Equity for Piggly Wiggly Yuma Co.

[Endorsed]: Filed Nov. 23, 1932. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk. [8]

[Title of Court and Cause.]

ORDER AUTHORIZING SALE OF PROPERTY

The petition of LEO A. MADDEN, Ancillary Receiver herein, for an order for the sale of the fixtures and stock of merchandise located in the PIGGLY WIGGLY STORE No. 1, at 258-260 Main Street, Yuma, Arizona, and for assignment of the leasehold interest in said premises, came on regularly to be heard this day, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said petition be and the same hereby is granted, and that said LEO A. MADDEN, Receiver, be and he hereby is authorized and instructed to sell at prvate sale, without notice, all of his right, title and interest as Receiver, and all the right, title and interest of PIGGLY WIGGLY YUMA COMPANY, a cor-

poration, defendant herein, in and to said fixtures and stock of merchandise, and assign all of said right, title and interest in and to said leasehold interest, for the sum of $2250.00; and said sale and assignment shall be final.

DATED THIS 23rd day of November, 1932.

F. C. JACOBS,
District Judge.

[Endorsed]: Filed Nov. 23, 1932. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk. [9]

[Title of Court and Cause.]

PETITION OF LEAH GOLDSMITH, LIEN CREDITOR AND CLAIMANT, FOR ORDER DIRECTING RECEIVER TO PAY ACCRUED RENT AND COSTS OF REPAIRS.

Comes now Morris LaCofske, by his attorney-in-fact, LEAH GOLDSMITH, represented by Marks & Marks, her attorneys, and respectfully shows to the Court:

I.

That in the above-entitled court and cause, on the 14th day of March, 1932, Leo A. Madden was duly appointed ancillary receiver of the Piggly Wiggly Yuma Company, a corporation, on the petition of the above-named plaintiffs; that in the Order of Appointment said Leo A. Madden was

required to execute a bond in the sum of $10,000.00; that on the 16th day of March, 1932, he did present and file his bond in said sum with the American Surety Company of New York, as surety; that said Surety Company is duly qualified to execute fiduciary bonds in the state and federal courts of the State of Arizona; that said bond was approved by the Judge of the above-entitled court on the 21st day of March, 1932. That thereupon said Leo A. Madden entered upon his duties as receiver of the above-entitled defendant corporation, and ever since has been, and now is, the duly qualified and legally acting receiver of said defendant.

II.

That among the assets which the said Leo A. Madden took possession [10] of as receiver of said Piggly Wiggly Yuma Company was a grocery business carried on by said Company in Yuma, Yuma County, Arizona, in a store building owned by said Morris LaCofske, which premises are described as:

> "North Eighteen (N18) feet six inches (6") of Part F of Lot Eight (8), Block Fourteen (14), and the South Half (S½) of the Pancrazi Building on Unit F of Lot Eight (8), Block Fourteen (14), of the City of Yuma,"

which real estate was improved with a large store building, in which said grocery business, consisting of a large stock of merchandise and fixtures and equipment, was carried on.

III.

That at the time the said receiver, Leo A. Madden, took possession of said grocery business as an asset of said estate, there was in full force and effect two certain leases between the said Morris LaCofske and said Piggly Wiggly Yuma Company, a corporation, under which leases the said Piggly Wiggly Yuma Company was occupying said premises.

That the first of said leases was entered into in writing on the 18th day of February, 1924, by and between A. T. Pancrazi and Catherine Pancrazi, husband and wife, as lessors, and the Piggly Wiggly Yuma Company, a corporation, as lessee, and covered the North 18′ 6″ of Part F of Lot 8, Block 14, of the City of Yuma, together with a building to be erected thereon, and was and is for a period of ten years from the date of occupancy, and the said lease providing for rent to be paid by lessee for the first five years at $150.00 per month and for the second five years at $175.00 per month, said rent being made payable monthly in advance.

That in said lease the lessee agreed among other things:

Paragraph C:

"To keep the interior of the premises in good order and condition, and surrender the same at the expiration of the term of this lease in like good order and condition as when taking possession thereof, ordinary wear and tear and

casualties by fire, the elements acts of God, or the public enemies alon*g* excepted."

That it is further agreed in said lease as follows:

"And it is agreed that the lessee shall have the right to assign or transfer this lease, or under-lease, or [11] sublet a portion or the whole of said premises, provided that this shall not prejudice or effect any covenant or agreement of this lease, as aforesaid, it shall remain liable to the said lessors for full payment of the rent the same as if such assignment had not been made.

"It is further mutually understood and agreed by and between the parties hereto that the terms of this lease is binding upon the heirs, executors, administrators and assigns of all parties, and that no waiver of any breach or of any covenant herein shall be construed as a waiver of the covenant itself or of any subsequent breach thereof."

That on November 28, 1924, the lessors named in said lease sold and conveyed all their right, title and interest in and to said lease above mentioned, and the rents and profits to be derived therefrom, to said Morris LaCofske, and the said Piggly Wiggly Yuma Company, in writing, on the same date, acknowledged notice of the transfer of said lease, and in writing recognized said Morris LaCofske as the new landlord of the premises described in said lease.

IV.

That the second of said leases above referred to, was entered into in writing on the 6th day of October, 1924, by and between A. T. Pancrazi and Catherine Pancrazi, husband and wife, as lessors, and Piggly Wiggly Yuma Company, a corporation, as lessee, and covered the South Half of the Pancrazi Building on Unit F of Lot 8, Block 14 of the City of Yuma, and was and is for a period of ten years from said date of lease, providing for rent to be paid by the lessee for the first year at a monthly rental of $125.00 a month, for the next four years at $150.00 per month, and the last five years of said lease at $175.00 per month, payable in advance.

That on November 28, 1924, the Lessors named in said lease sold and conveyed all their right, title and interest in and to said lease above mentioned, and the rents and profits to be derived therefrom, to said Morris LaCofske, and the said Piggly Wiggly Yuma Company, in writing, on the same date, acknowledged notice of the transfer of said lease, and in writing recognized said Morris LaCofske as the new landlord of the premises described in said lease. [12]

V.

That ever since November 28, 1924, the said Morris LaCofske has been, and now is, the owner of the premises described in said leases, and ever since said date he was, and now is, the owner of said leases above described.

VI.

That after said Leo A. Madden was appointed receiver as aforesaid, he continued to occupy said leased premises as aforesaid, and continued to operate said grocery business in said leased premises as aforesaid, and said receiver paid the rent due under said leases from time to time to said owner up to and including the 15th day of November, 1932.

VII.

That on or about May 2, 1932, the said Morris LaCofske, through his attorney, C. A. Lindeman, filed his claim for rents, and his claim arising under Paragraph C above set out, due him and to become due him under said leases aforesaid with the said Leo A. Madden, receiver aforesaid, said claim being in words and figures as follows:

"IN THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, NORTHERN DIVISION.

No. .....

"Cramer's Bakery, Inc., Ltd., et al.,
Plaintiffs,

vs.

Piggly-Wiggly Yuma Co., a corporation,
Defendant.

CLAIM OF MORRIS LaCOFSKE FOR RENT.

"TO LEO A. MADDEN, FEDERAL RECEIVER IN EQUITY, PIGGLY-WIGGLY

YUMA CO., Room 3, 110 North Sixth Street, El Centro, California:

"The undersigned MORRIS LaCOFSKE hereby presents his claim against Piggly-Wiggly Yuma Co. for the rental of two store rooms at Yuma, Arizona, under the following leases, copies of which are attached hereto and made a part hereof:

(1) Lease dated February 18, 1924, effective for ten (10) years from June 1, 1924, from A. T. Pancrazi et ux as lessors, which lease was [13] assigned by said lessors to the claimant herein on November 28, 1924, for the store building on the North Eighteen (N18) feet six inches (6') of Part F of Lot Eight (8), Block Fourteen (14) of said City of Yuma.

"(2) Lease dated October 6, 1924, effective ten (10) years from said date from said A. T. Pancrazi et ux as lessors, which lease was assigned by said lessors to the claimant herein on November 28, 1924, covering the South Half (S½) of the store building on said unit F of Lot 8 aforesaid.

"The amounts claimed thereunder are as follows:

Rent unpaid by said Piggly-Wiggly Yuma Co. under the aforesaid lease numbered (1) from February 1, 1932, to March 13, 1932, inclusive, one and 13/31 months at $175.00 per month.....$ 248.39

"Rent unpaid by said Piggly-Wiggly Yuma Co. under the afore-

said lease numbered (2) from February 1, 1932, to March 13, 1932, inclusive, one and 13/31 months at $175.00 per month 248.39

"Rent for the unexpired portion of the aforesaid lease numbered (1) from March 13, 1932, to June 1, 1934, being two years, two months and seventeen days at $175.00 per month..... 4649.17

"Rent for the unexpired portion of the aforesaid lease numbered (2) from March 13, 1932, to October 6, 1934, being two years, six months and twenty-three days at $175.00 per month 5384.17

"Estimated cost of removing present temporary partitions upon termination of the aforesaid leases and restoring said building to the same condition in which it was delivered to lessee 965.00

"Estimated cost of restoring electric wiring at termination of leases to the condition in which it was delivered to lessee 155.05

"Total $11,650.17

"Less credits as follows:

"Paid by Receiver for rent accrued during his occupancy of the aforesaid premises:

"March 14 to 31, 1932, 18/31 months at $350.00 ..... $203.22
"April 1 to 30, 1932 ..... 350.00

"Total Credits $553.22 553.22

"NET BALANCE DUE $11,096.95

"The undersigned claims the landlord's lien given by the laws of the State of Arizona upon all of the lessee's merchandise, fixtures, furniture and all other personal property upon said leased premises to secure the payment of [14] the rent for the full term of said leases, as well as to secure the performance of all of the terms of said leases, including the cost of restoring the same at the termination thereof to the same condition in which they were received by the lessee.

"Dated at Los Angeles, California, April 30, 1932.

(Signed) Morris LaCofske,
Claimant.

"C. A. Lindeman,
Attorney for Claimant.

"State of California,
County of Los Angeles.—ss.

"Morris LaCofske, being first duly sworn, deposes and says, that he is the claimant above named; that he has read the foregoing claim and knows the contents thereof, and that the same is true of his own knowledge in substance

and in fact; that the amount claimed therein is justly due him from Piggly-Wiggly Yuma Co., a corporation, and that there are no offsets or counter-claims thereto for which credit has not been given therein.

(Signed) Morris LaCofske

"Subscribed and sworn to before me this ..... day of ....., 1932.

.....

Notary Public in and for said County and State. (Seal)"

VIII.

Claimant avers that the provisions of Paragraph 3671 Revised Statutes of Arizona, Civil Code, 1913, were in effect when said leases aforesaid were entered into as aforesaid, and reads and provides as follows:

"Every landlord shall have a lien on all the property of his tenant not exempt by law, placed upon or used on the leased premises until his rent shall be paid, and such landlord, his agent, or attorney, may seize, for rent, any personal property of his tenant that may be found on the premises or in the county where such tenant shall reside, but no property of any other person, although the same may be found on the premises, shall be liable for seizure for rent due from such tenant, and in case of failure of the tenant to allow the landlord, his agent or attorney to take possession of such property for the payment of rent, said landlord

shall have the right to reduce such property to his possession by action against the tenant to recover the possession of the same, and may hold or sell the same for the purpose of paying said rent unless said rent shall be paid before sale, * * * and also for the faithful performance of the terms of the lease, and such lien shall continue for a period of six months after the expiration of the term for which the premises were leased, and, in all cases where the demised premises shall be let or lease assigned, the landlord shall have the same right to enforce his lien against the sub-lessee or assignee as he has against the tenant to whom the premises were leased." [15]

That said provision continued in effect during the term of said leases, and the provisions of said Paragraph 3671 aforesaid is now known as Paragraph 1958, Revised Code of Arizona, 1928, and reads as follows:

"The landlord shall have a lien on all the property of his tenant not exempt by law, placed upon or used on the leased premises until his rent is paid, such lien, however, shall not secure the payment of rent ensuing after the death or bankruptcy of the lessee or after an assignment for the benefit of lessee's creditors, and such landlord may seize, for rent, any personal property of his tenant found on the premises, but the property of any other person, although found on the premises, shall not be liable. If the tenant

fail to allow the landlord to take possession of such property for the payment of rent, the landlord may reduce such property to his possession by action to recover possession, and may hold or sell the same for the purpose of paying said rent. * * * and also for the faithful performance of the terms of the lease, and such lien shall continue for a period of six months after the expiration of the term for which the premises were leased. Where the premises are sub-let or the lease assigned, the landlord shall have the like lien against the sublessee or assignee as he has against the tenant and may enforce the same in like manner."

That plaintiff has at all times, and does now claim the benefits of the lien given a landlord, as aforesaid.

IX.

That said Leo A. Madden, receiver aforesaid, on November 23, 1932, filed his petition in the above-entitled court and cause praying for an order permitting him to sell said stock of merchandise and fixtures and his interest in said leasehold, for the sum of $2250.00, being the same grocery business of the defendant above referred to.

That on the same day, and without any notice of any kind to said Morris LaCofske, the owner of said premises and said leases aforesaid, or without any notice to your claimant with whom

said receiver had theretofore discussed matters regarding said receivership and said grocery business, an order was entered in said cause by the said above-entitled court permitting the sale of said stock of merchandise and fixtures and interest in said leasehold for the sum of $2250.00 cash to Herman J. Schwartz and Jessie E. Schwartz; that said sale was consummated, and said receiver received said sum of money. [16]

X.

That on November 30, 1932, the receiver notified C. A. Lindeman at Los Angeles, California, the attorney for Morris LaCofske, that he, the receiver, had sold to Herman J. Schwartz the store at Yuma, and that said Schwartz took possession of said business as of November 16, 1932, and stated that all future demands must be made on said Herman J. Schwartz, said receiver at the time transmitting his check to Morris LaCofske for $1021.75, being as and for unpaid rent due from said receiver to said Morris LaCofske, computing the same to November 15, 1932.

XI.

Your claimant, Leah Goldsmith, further avers that Morris LaCofske, the owner of said premises and leases aforesaid, is her father; that he lives in Los Angeles, State of California; that your petitioner lives in Yuma, Yuma County, Arizona, where said premises are situated; that neither her father nor she were advised with or consulted

about the sale of said merchandise and fixtures and leases to said Herman J. Schwartz by said receiver, or by anyone for him; that she now has a general Power of Attorney from her father, with instructions and authority to represent him in this proceeding.

XII.

Your claimant further avers that said Herman J. Schwartz paid no rent for said leased premises from the time possession of said stock of merchandise and fixtures was given him by said receiver, and your claimant avers that sometime after business hours, on the evening of Saturday, the 3d of December, 1932, and during Sunday, the 4th day of December, 1932, and without the knowledge and consent of your claimant or her principal, said Herman J. Schwartz moved out all the merchandise and much of the movable fixtures used in connection with said grocery business conducted in said leased premises aforesaid, and the whereabouts of said merchandise and fixtures is unknown to your claimant.

XIII.

Your claimant further avers that she notified said receiver, Leo A. Madden, promptly of what had occurred with regard to said premises and said [17] receiver disclaimed any further interest or responsibility in said matter.

XIV.

Your claimant further avers that on January 7, 1933 she caused her present attorneys to send a

notice on behalf of the owner of said premises and leases aforesaid to said receiver by registered mail, which notice is in words and figures as follows:

"Phoenix, Arizona, January 7, 1933.

"Leo A. Madden, Federal Receiver in Equity,
Piggly-Wiggly Yuma Company,
110 North Sixth Street, Room #3,
El Centro, California.

"Hickcox, Trude & Robertson, his attorneys,
Rehkopf Building,
El Centro, California.

"Fred Blair Townsend and C. A. Edwards, his attorneys,
Luhrs Tower
Phoenix, Arizona.

"Dear Sirs:

You and each of you are hereby advised that Herman J. Schwartz and Jessie Schwartz, husband and wife, to whom you sold at private sale without notice the store belonging to the Piggly-Wiggly Yuma Company Estate, situated in Yuma, Yuma County, Arizona, which sale was confirmed by the United States District Court for the District of Arizona on November 23, 1932, said sale conveying certain fixtures and merchandise which was covered by the landlord's lien of Morris C. LaCofske and Katie LaCofske, husband and wife, of Los Angeles, California, for which sale, and order confirming the same, carried with it the assignment to and assumption by said purchasers of the leases held by said Morris C. LaCofske and Katie LaCofske, as well as the duty to pay the rent provided in said leases beginning Novem-

ber 16, 1932, moved out of said premises cometime between the evening of Saturday, December 3, 1932 and Sunday, December 4, 1932, taking with them all of the merchandise in said premises, as well as all of the valuable, movable fixtures in said premises; that said Herman J. Schwartz and Jessie S. Schwartz, husband and wife, paid to the landlords no rent whatsoever, and moved out without the consent of the landlords.

"You are advised that the owner and landlord of said premises, of which Piggy-Wiggly Yuma Company, a corporation, was the lessee and liable for the carrying out of said leases, holds you, as receiver of said company, responsible for the rent due under said leases from November 16, 1932 to the end of the terms fixed in said leases; the owner and landlord also holds you responsible for the carrying out of the provisions of Paragraph C of the lease of February 18, 1924. [18]

"The premises have been left in a very bad condition, and they are being held subject to the order of yourself as receiver. We would appreciate a prompt adjustment of the matter.

"This notice is given you in addition to the verbal notice heretofore given you.

"Yours very truly,
MARKS & MARKS,
By (Signed) B. E. MARKS
Attorneys for Morris C. LaCofske and Katie LaCofske, husband and wife, owners and lessors."

Which notice was received by said receiver; that said premises are still held by said landlord subject to the order of said receiver.

XV.

Your claimant further avers that in the order appointing said Leo A. Madden as receiver in the above-entitled proceedings, it is provided among other things that:

> "The receiver is hereby given a period of three months from the date hereof within which to arrive at a determination as to what contracts, including leases, of the defendant the receiver should affirm or disaffirm and within that time to make his election in that respect, the court reserves the right if so advised from time to time to extend or diminish the time so granted to the receiver within which to make such election."

And in this behalf claimant avers that said receiver occupied said premises aforesaid and carried on and continued said grocery business in said premises from the date of his appointment in March, 1932 to the date of the sale to said Herman J. Schwartz on November 23, 1932, which sale was made to take effect as of November 16, 1932.

That said receiver did not disaffirm said leases aforesaid within the three-months' period given him in said Order of Appointment; that said time has not been extended by the Court; that said receiver affirmed said leases and continued in possession of

said premises divered by said leases long after said three-months' period, and paid the rent provided for in said leases to November 16, 1932.

XVI.

Your claimant further avers that under the terms of said leases [19] aforesaid, rents were and are due and payable monthly in advance.

XVII.

Your claimant further avers that since said leased premises were vacated by said Herman J. Schwartz, she has endeavored to secure a tenant for said premises, without success, and said premises are now vacant.

XVIII.

Your claimant further avers that there is due her under the terms of said leases aforesaid from said receiver, Leo A. Madden, the balance of rent on said premises for the month of November, 1932, and for the months of December, 1932, January, February and March, 1933, being the sum of $1575.00.

XIX.

Your claimant further avers that under the provisions of Paragraph C of said lease of February 18, 1924, set out in Paragraph III above, she claims against said receiver, Leo A. Madden, and said estate, the sum of $1120.05 for the reason that said Lessee Piggly Wiggly Yuma Company after going into possession of said leased premises made certain changes without the consent of the landlord in the interior and in the fronts of said premises, tearing

out certain partitions, which it will cost $1120.05 to restore to the condition said premises were in when said lessee entered into possession of said premises.

WHEREFORE, your claimant prays for an Order as follows:

(a) Requiring the receiver, Leo A. Madden, to pay her forthwith the sum of $1575.00, as and for accrued rent on said premises;

(b) For the sum of $1120.05, as and for costs of restoring said premises to the condition they were in when lessee took possession, under the provisions of Paragraph C of the lease of February 18, 1924, which amount should be included in the lien of the claimant;

(c) To impress the fund realized and received by the receiver from the sale of the stock of merchandise and fixtures in said leased premises with a lien, as and for rent already accrued and to accrue. [20]

(d) That sufficient of the funds in the hands of the receiver be held as and for rent to accrue on said leased premises to satisfy the claim of claimant under said leases;

(e) For costs, and such other relief as in equity may be meet and proper.

LEAH GOLDSMITH
Claimant

MARKS & MARKS
Attorneys for Claimant
705 Title & Trust Building,
Phoenix, Arizona

State of Arizona
County of Yuma—ss.

LEAH GOLDSMITH, being first duly sworn, on her oath deposes and says:

That she is the Petitioner and Claimant above named; that she has read the foregoing Petition and knows the contents thereof, and that the matters and things therein stated are true.

LEAH GOLDSMITH

Subscribed and sworn to before me this 6th day of March, 1933.

[Notarial Seal] R. F. RUPP
Notary Public

My commission expires April 25, 1935.

Received copy of the within this 9th day of March, 1933.

TOWNSEND JENCKES & EDWARDS
Attorneys for Leo A. Madden, Federal Receiver in Equity Piggly-Wiggly Yuma Company, Defendant. [21]

[Endorsed]: Filed Mar 9, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk. [22]

[Title of Court and Cause.]

STIPULATION SUBMITTING CLAIMANT'S PETITION ON BRIEFS TO BE FILED.

IT IS HEREBY STIPULATED AND AGREED by and between Messrs. Marks & Marks,

attorneys for Leah Goldsmith, Claimant, and Messrs. Townsend, Jenckes & Edwards, attorneys for Leo A. Madden, ancillary receiver herein, that the facts set forth in the verified petition of the above-named claimant, filed in the above-entitled matter on March 9, 1933, are true and correct.

It is further stipulated that the questions of law presented by said petition in said receivership proceedings shall be briefed to the Court, the attorneys for the claimant having ten days from the date hereof to file the opening brief, the attorneys for the Receiver to have ten days after service upon them of the opening brief to file their answering brief, and the attorneys for the claimant to have five days after service upon them of the answering brief to file a reply brief if they so desire.

Dated at Phoenix, Arizona, this 3d day of April, 1933.

MARKS & MARKS
Attorneys for Claimant
Leah Goldsmith
TOWNSEND, JENCKES & EDWARDS
Attorneys for Receiver
Leo A. Madden [23]

[Endorsed]: Filed Apr. 3, 1933. J. Lee Baker, Clerk United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk.
[24]

[Title of Court and Cause.]

ORDER FOR DECREE.

The defendant having stipulated to the facts recited in the petition of Morris LaCofske for the recovery of rent of premises occupied by the defendant, and submitted the matter on said facts;

The court finds in favor of the petitioner, Morris LaCofske, on all allegations of the complaint, save and except those recited in paragraph XIX, and as to the facts recited therein, the court finds in favor of the defendant;

That as to the liability for the payment of rent not yet accrued under the lease, and the amount thereof, the question is reserved to be determined by the court in the light of future conditions;

WHEREFORE, IT IS ORDERED that the petitioner prepare special findings of fact, conclusions of law and a decree in accordance herewith.

DATED THIS 28th day of June, 1933.

F. C. JACOBS,
U. S. District Judge [25]

[Endorsed]: Filed Jun 28, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk. [26]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION OF LEAH GOLDSMITH, CLAIMANT, ON BEHALF OF MORRIS LaCOFSKE.

THIS MATTER coming on before the Hon. F. C. Jacobs, United States District Judge, upon the petition of LEAH GOLDSMITH, lien creditor and claimant, for order directing receiver; said petitioner appearing by Marks & Marks, of Phoenix, Arizona, her attorneys; and said Receiver by and through his attorneys, Townsend, Jenckes & Edwards, Esqs., of Phoenix, Arizona, having stipulated that the facts recited in the Petition are true and correct, and the parties having submitted the matter on said facts, and the Court having required the respective parties to file briefs in support of their respective positions, and said briefs having been filed, and the Court being now sufficiently advised in the premises, finds, on this 28th day of June, 1933, in favor of the petitioner, Morris LaCofske, on all of the allegations of the complaint, save and except those recited in Paragraph XIX and as to the facts recited therein the Court finds in favor of the defendant; the Court particularly and especially finds as follows:

I.

That ever since the 21st day of March, 1932, Leo A. Madden, has been, and now is, the duly appointed, qualified and legally acting receiver of the defendant, Piggly Wiggly Yuma Company, a corporation.

II.

That among the assets which the said Leo A. Madden took possession of [27] as receiver of said Piggly Wiggly Yuma Company was a grocery business carried on by said Company in Yuma, Yuma County, Arizona, in a store building owned by said Morris LaCofske, which premises are described as—

> "North eighteen (N18) feet six inches (6") of Part F of Lot eight (8), Block fourteen (14), and the South Half (S½) of the Pancrazi Building on Unit F of Lot eight (8), Block Fourteen (14), of the City of Yuma,"

which real estate was improved with a large store building, in which said grocery business, consisting of a large stock of merchandise and fixtures and equipment, was carried on.

III.

That at the time said receiver took possession of said grocery business, there was in full force and effect two leases between the owner, Morris LaCofske, and the defendant covering the premises occupied by said defendant, one of said leases expiring July 1, 1934 and the other expiring on October 6, 1934; the total rent reserved being $350.00 a month, payable monthly in advance.

IV.

That in said lease the lessee agreed among other things:—

Paragraph C

"To keep the interior of the premises in good

order and condition, and surrender the same at the expiration of the term of this lease in like good order and condition as when taking possession thereof, ordinary wear and tear and casualties by fire, the elements acts of God, or the public enemies alone excepted."

That it is further agreed in said lease as follows:

"And it is agreed that the lessee shall have the right to assign or transfer this lease, or underlease, or sublet a portion or the whole of said premises, provided that this shall not prejudice or effect any covenant or agreement of this lease, as aforesaid, it shall remain liable to the said lessors for full payment of the rent the same as if such assignment had not been made.

"It is further mutually understood and agreed by and between the parties hereto that the terms of this lease is binding upon the heirs, executors, administrators and assigns of all parties, and that no waiver of any breach or of any covenants herein shall be construed as a waiver of the covenant itself or of any subsequent breach thereof." [28]

V.

That said Leo A. Madden, receiver, continued to operate said grocery business in said leased premises and paid the rent to the owner up to and including the 15th day of November, 1932.

VI.

That on or about May 2, 1932, the said owner and landlord filed his claim for rents to the end of the

period provided in said leases, and included his claim arising under Paragraph C of said lease, in Finding IV above set out, with said receiver.

VII.

That said owner has at all times herein mentioned claimed and does claim the benefits of a lien given to the landlord under Paragraph 3671, R. S. A., 1913, and Paragraph 1958, R. C. A., 1928.

VIII.

That on November 23, 1932, Leo A. Madden, receiver, without notice to the landlord and under ex parte proceedings, sold the stock of merchandise and fixtures and interest in said leasehold for the sum of $2250.00 cash, which sale was confirmed on the same day to be effective as of November 16, 1932.

IX.

That the buyer shortly after taking possession of said merchandise and fixtures, without notice to the landlord, without his consent and without paying any rent, moved out of said premises, taking everything movable with him; the landlord notifying the receiver promptly of the action of said purchaser.

X.

That the landlord has at all times held said premises subject to the order of the receiver; that said landlord has been diligent in claiming and protecting his rights; that he has endeavored to secure a tenant for said premises, without success.

XI.

That in the order appointing said Leo A. Madden as receiver in the above-entitled proceedings, it is provided among other things that— [29]

> "The receiver is hereby given a period of three months from the date hereof within which to arrive at a determination as to what contracts, including leases, of the defendant the receiver should affirm or disaffirm and within that time to make his election in that respect, the court reserves the right if so advised from time to time to extend or diminish the time so granted to the receiver within which to make such election."

That said receiver occupied said premises aforesaid and carried on and continued said grocery business in said premises from the date of his appointment in March, 1932 to the date of the sale on November 23, 1932, which sale was made to take effect as of November 16, 1932.

That said receiver did not disaffirm said leases aforesaid within the three-months' period given him in said Order of Appointment; that said time has not been extended by the Court; that said receiver affirmed said leases and continued in possession of said premises covered by said leases after said three-months' period, and paid the rent provided for in said leases to November 16, 1932.

XII.

That there is due claimant under the terms of said

leases aforesaid from said receiver, Leo A. Madden, the balance of rent on said premises for the month of November, 1932, and for the months of December, 1932, January, February and March, 1933, being the sum of $1575.00.

XIII.

That the landlord is not entitled to recover anything from said receiver under Paragraph C of said lease in Finding IV above set out.

XIV.

The court further finds that, since the filing of said petition on March 9, 1933, said premises have not been rented by claimant, landlord and owner of said premises, nor by the receiver, Leo A. Madden, and that there has accrued rents, since the filing of said petition to this date, to-wit: for the months of April, May, June and July, 1933, at the rate of $350.00 a month as provided in said leases, or a total of $1400.00.

From the foregoing Findings of Fact, the Court draws the following CONCLUSIONS OF LAW: [30]

1. That the owner of said premises and landlord had a lien under the provisions of the statutes of Arizona for the entire term of said leases upon all of the property of his tenant placed upon or used on the leased premises until his rent is paid.

2. That the receiver, Leo A. Madden, affirmed the leases, which were in effect at the time of his appointment as receiver in the above-entitled proceedings, between the owner of said premises, Morris

LaCofske, and the defendant, Piggly Wiggly Yuma Company, a corporation.

3. That by the sale of the property situated in the leased premises to a third person, the receiver, Leo A. Madden, did not relieve himself of the duty and obligation to pay the rent to the landlord provided for in said leases.

4. That the owner and landlord, Morris LaCofske, has been diligent in all things connected with said leases, and has been diligent in presenting his claim to the receiver.

5. That the owner and landlord, Morris LaCofske, is entitled to recover from Leo A. Madden, receiver of the Piggly Wiggly Yuma Company, a corporation, defendant, the sum of $1575.00 forthwith, as and for rent due on said premises up to the time of the filing of the petition in March, 1933.

6. That the owner and landlord, Morris LaCofske, is entitled to recover from Leo A. Madden, receiver of the Piggly Wiggly Yuma Company, a corporation, defendant, the sum of $1400.00, as and for rent accrued since the filing of said petition to and including the month of July, 1933.

7. That the owner and landlord, Morris LaCofske, is entitled to a first lien upon the funds realized and received by said receiver, Leo A. Madden, from the sale of the stock of merchandise and fixtures in said leased premises for the sums herein set out, and that payment of said amounts shall be made by said receiver forthwith.

8. That if the funds in the hands of the receiver,

Leo A. Madden, realized and received from the sale of the stock of merchandise and fixtures in said leased premises be not sufficient to pay the amounts herein set forth, that the receiver use such other funds as he may have for said purpose. [31]

9. That the claimant, Morris LaCofske, is entitled to recover his costs herein incurred, to be taxed and allowed as provided by law.

10. The Court further finds and holds that as to the liability for the payment of rent not yet accrued under the leases, and the amount thereof, the question is reserved to be determined by the court in the light of future conditions.

Dated at Prescott, Arizona, this 18th day of July, 1933.

F. C. JACOBS
United States District Judge

Received copy of the within this 14th day of July, 1933.

TOWNSEND, JENCKES & EDWARDS
& CHAS. B. WARD
Attorneys for Leo A. Madden, Receiver

[Endorsed]: Filed Jul 18, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk. [32]

In the District Court of the United States in and for the District of Arizona.

NO. E-244-Phoenix

CRAMER'S BAKERY, INC., Ltd., a corporation;
IMPERIAL VALLEY MILK PRODUCERS ASSOCIATION, a corporation;
VALLEY WHOLESALE MEAT COMPANY, a corporation; and
HAROLD W. HERLIHY, as Receiver of U-SAVE HOLDING CORPORATION, a corporation
Plaintiffs

vs.

PIGGLY WIGGLY YUMA COMPANY, a corporation
Defendant

DECREE.

THE COURT having heretofore, on the..... day of July, 1933, signed and filed its Findings of Fact and Conclusions of Law in said above-entitled proceedings;

IT IS NOW, BY THE COURT, ORDERED, ADJUDGED AND DECREED that MORRIS LaCOFSKE had and has a lien under the provisions of the Statutes of Arizona for the entire term of the leases between said Morris LaCofske, as owner, and the defendant, Piggly Wiggly Yuma Company, a corporation, as tenant, on the property of said tenant, placed upon or used on the leased premises by said tenant, one of which leases expires June 1, 1934, and one of which leases expires on

October 6, 1934, at the total rent of $350.00 per month.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, defendant, affirmed said leases and that he did not relieve himself of the liability provided for in said leases by an assignment of said leases; that the said Morris LaCofske has been diligent in pressing his claim for rent to said Receiver; that said Receiver has paid rent on said premises to November 16, 1932.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Morris LaCofske do have and recover judgment against Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, defendant, for the sum of ONE THOUSAND FIVE HUNDRED AND [33] SEVENTY-FIVE DOLLARS ($1,575.00), being rent to and including the month of March, 1933, and that payment of said sum be made forthwith, that said amount carry interest at six per cent (6%) per annum from this date until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Morris LaCofske do have and recover judgment against Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, defendant, for the sum of ONE THOUSAND FOUR HUNDRED DOLLARS ($1,400.00), being rent from April, 1933 to and including July, 1933, and that payment of said sum be made forthwith, that said amount carry interest at six per cent (6%) per annum from this date until paid.

That the foregoing judgment of Two thousand Nine Hundred and Seventy-five dollars ($2,975.00), together with interest as herein provided, is a first lien on the amount realized by the Receiver from the sale of said merchandise and fixtures placed upon and used in said leased premises, and that payment shall be made out of said moneys, and the balance out of any other moneys coming into the hands of said Leo A. Madden, Receiver.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Morris LaCofske do have and recover judgment from the said Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, defendant, for his costs herein incurred, taxed and allowed at $.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Morris LaCofske do have and recover nothing from the said Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, defendant, as and for restoring said premises under Paragraph C of said lease of February 18, 1924.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to the liability for the payment of rent not yet accrued under the leases, and the amount thereof, the question is reserved to be determined by the court in the light of future conditions.

DATED AT PRESCOTT, ARIZONA, this 18th day of July, 1933.

F. C. JACOBS
United States District Judge [34]

Received copy of the within this 8th day of July, 1933.

FRED BLAIR TOWNSEND, C. A. EDWARDS & CHARLES B. WARD

Attorneys for Receiver, Leo A. Madden.

[Endorsed]: Filed Jul 18, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk.

[35]

[Title of Court and Cause.]

PETITION FOR APPEAL.

TO THE HONORABLE F. C. JACOBS, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF ARIZONA:

LEO A. MADDEN, Ancillary Receiver in the above-entitled cause, considering himself aggrieved by the decree made and entered in said cause on the 18th day of July, 1933, prays that he may be permitted to take an appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith.

And your petitioner desires that said appeal shall operate as a supersedeas, and therefore prays that an order be made fixing the amount of security which said Leo A. Madden shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be sus-

pended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 9th, 1933.

TOWNSEND, JENCKES & EDWARDS
Attorneys for Leo A. Madden [36]

Received copy of Petition for Appeal this 11th day of August, 1933.

MARKS & MARKS
By B. E. MARKS
Attorneys for Morris LaCofske

[Endorsed]: Filed Aug. 14, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk.

——— [37]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

COMES NOW, Leo A. Madden, Ancillary Receiver in the above-entitled cause, and files the following Assignment of Errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause, from the decree of this court entered on the 18th day of July, 1933.

1. The court erred in holding that the appellant, Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, did not relieve himself of the liability provided for in the leases described in said decree by assigning said leases.

2. The court erred in ordering judgment against Leo A. Madden, Receiver of Piggly Wiggly Yuma

Company, a corporation, in the sum of One Thousand Five Hundred Seventy-Five and No 100 ($1,575.00), as for rent to and including the month of March, 1933, together with interest thereon at 6% per annum from the date of said decree.

3. The court erred in ordering judgment against Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a cor- [38] poration, in the sum of One Thousand Four Hundred and No 100 ($1,400.00) Dollars, as for rent from April, 1933, to and including July, 1933, together with interest thereon at 6% per annum from the date of said decree.

4. The court erred in ordering that the total amount of said judgment, to-wit: $2,975.00, together with interest as therein provided, is a first lien on the amount realized by the said Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, from the sale of merchandise and fixtures placed upon and used in said premises.

5. The court erred in ordering that payment of the total amount of said judgment should be made out of the moneys realized by said Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, as aforesaid.

6. The court erred in ordering that payment of the balance remaining on said judgment of Two Thousand Nine Hundred Seventy-Five and No/100 ($2975.00) after application of the amount realized by said Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, from the sale of merchandise and fixtures placed upon or used in said premises, should be made out of any other

moneys coming into the hands of said Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation.

7. The court erred in ordering that said Morris LaCofske recover judgment against Leo A. Madden, Receiver of Piggly Wiggly Yuma Company, a corporation, for his costs incurred herein.

8. The court erred in ordering that as to the liability for the payment of rent not yet accrued in said leases, and the amount thereof, the question should be reserved to be determined by the court in the light of future conditions. [39]

WHEREFORE, Leo A. Madden, Ancillary Receiver in the above-entitled cause, and appellant herein, prays that the said decree may be reversed, and for such other and further relief as to the court may seem just and proper.

Dated August 9th, 1933.

TOWNSEND, JENCKES & EDWARDS
Attorneys for Appellant.

RECEIVED copy of foregoing Assignment of errors this 11th day of August, 1933.

MARKS & MARKS
By B. E. MARKS
Attorneys for Morris LaCofske.

[Endorsed]: Filed Aug. 14, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk. [40]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL, WITH SUPERSEDEAS.

The petition of Leo A. Madden, Ancillary Receiver in the above-entitled cause, for an appeal from the decree of this court entered on the 18th day of July, 1933, is hereby granted and the appeal is allowed; and upon petitioner filing a bond in the sum of Three thousand five hundred dollars, with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the decree made and entered in the above cause on the date aforesaid, and shall suspend and stay all further proceedings in this court until the determination of said appeal by the United States Circuit of Appeals for the Ninth Circuit.

Dated August 14th, 1933.

F. C. JACOBS
District Judge. [41]

Received copy of above order this 15th day of August, 1933.

MARKS & MARKS
B. E. MARKS
Attorneys for Appellee

[Endorsed]: Filed Aug. 28, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk. [42]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, LEO A. MADDEN, ancillary receiver of Piggly Wiggly Yuma Company, a corporation, as principal, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, as surety, are held and firmly bound unto Morris LaCofske in the full and just sum of THIRTY-FIVE HUNDRED AND NO/100 DOLLARS ($3500.00) to be paid to the said Morris LaCofske, his heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our hears, executors, and administrators jointly and severally by these presents.

SEALED WITH OUR SEALS and dated this 5th day of September, 1933.

WHEREAS, lately to-wit: on the 18th day of July, 1933, in an equity proceeding in the District Court of the United States in and for the District of Arizona, wherein the said Morris LaCofske filed his petition in the above entitled Court and cause for an order directing the said receiver, LEO A. MADDEN, to pay over certain moneys to the said Morris LaCofske, a decree was rendered in favor of the said LaCofske, and against the said LEO A. MADDEN, ancillary receiver, allowing said petition in part, and the said LEO A. MADDEN, ancillary receiver, having obtained [43] leave to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and a citation has been issued, directed to the said Morris LaCofske citing

him to appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, thirty (30) days from and after the date of such citation.

NOW THE CONDITION of the above obligation is such that, if the said LEO A. MADDEN, ancillary receiver, shall prosecute said appeal to effect, and answer all damages and costs, if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

LEO A. MADDEN
Ancillary Receiver of Piggly Wiggly Yuma Company, a corporation,
Principal

AMERICAN SURETY COMPANY
[Seal] OF NEW YORK
Surety

By FRED BLAIR TOWNSEND
Resident Vice-President

By W. K. JAMES
Resident Ass't Secretary

United States of America
State of California
County of Imperial—ss.

Before me, the undersigned authority, on this day personally appeared LEO A. MADDEN, known to me to be the person whose name is subscribed to the foregoing instrument as ancillary receiver of Piggly Wiggly Yuma Company, a corporation, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 5th day of September, 1933.

[Seal] LYMAN B. ROBERTSON
Notary Public.

My commission expires 1/16/1935. [44]

United States of America
State of Arizona
County of Maricopa—ss.

Before me, the undersigned authority, on this day personally appeared FRED BLAIR TOWNSEND and W. K. JAMES, known to me to be the persons whose names are subscribed to the foregoing instrument as Resident Vice-President and Resident.....Secretary of AMERICAN SURETY COMPANY OF NEW YORK, and acknowledged to me that they executed the same for the purposes and consideration therein expressed, and in the capacities therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 9th day of October, 1933.

[Seal] MARTHA P. FLETCHER
Notary Public

My commission expires Jan. 18, 1935.

APPROVED October 12th, 1933.

HON. F. C. JACOBS
Judge District Court of the United States in and for the District of Arizona.

[Endorsed]: Filed Oct. 12, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk. [45]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO THE CLERK OF THE ABOVE COURT:

You are hereby requested to make a transcript of record, to be filed in the United States Circuit Court of Appeals, for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other, papers and exhibits, to-wit:

1. Petition for order authorizing sale of property —Dated November 22, 1932;
2. Order authorizing sale of property—Dated November 23rd, 1932;
3. Petition of Leah Goldsmith, lien creditor and claimant, for order directing receiver—Filed March 9th, 1933;
4. Stipulation—Dated April 3rd, 1933;
5. Order for decree—Dated June 28th, 1933;
6. Findings of fact and conclusions of law on petition of Leah Goldsmith, claimant, on behalf of Morris LaCofske—Dated July 18th, 1933;
7. Decree—Dated July 18th, 1933;
8. Petition for appeal—Dated August 9th, 1933—Filed August 14th, 1933;
9. Order allowing appeal, with supersedeas—Dated August 14th, 1933; [46]
10. Assignment of errors—filed August 14th, 1933;
11. Citation on appeal—Dated August 14th, 1933;
12. Order extending time for filing transcript of record on appeal—Dated September 9th, 1933; and

13. Supersedeas and Cost Bond;
14. This praecipe and service thereon.

Said transcript to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals, for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, on or before the 14th day of October, 1933, pursuant to the order of this Court enlarging and extending said time.

Dated September 26th, 1933.

TOWNSEND, JENCKES & EDWARDS
Attorneys for Appellant.

Service of this praecipe accepted and acknowledged this 29th day of September, 1933.

MARKS & MARKS mm
Attorneys for Appellee.

[Endorsed]: Filed Oct. 7, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk.

——— [47]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD ON APPEAL.

TO THE HONORABLE F. C. JACOBS, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF ARIZONA:

IT IS ORDERED that the time for filing the

transcript of record on appeal in the above entitled cause is hereby extended to not later than the 14th day of October, 1933.

DATED this 9th day of September, 1933.

F. C. JACOBS,
Judge of the United States District Court, in and for the District of Arizona.

[Endorsed]: Filed Sep 9, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk.

[48]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET RECORD AND PERFECT APPEAL.

For good cause shown, it is hereby

ORDERED that the time in which Leo A. Madden, appellant herein, may docket the record in the Circuit Court of Appeals of the United States, in and for the Ninth Circuit, and perfect his appeal from the decree entered in this Court on July 18th, 1933, be, and the same hereby is, extended to the 14th day of November, 1933.

DATED this 12th day of October, 1933.

F. C. JACOBS,
District Judge.

[Endorsed]: Filed Oct. 12, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk.

[49]

[Title of Court.]
United States of America
District of Arizona—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Cramer's Bakery Inc. Ltd., a corporation; Imperial Valley Milk Producers Association, a corporation; Valley Wholesale Meat Company, a corporation, and Harold W. Herlihy as Receiver of U Save Holding Corporation, a corporation, Plaintiffs, versus Piggly Wiggly Yuma Company, a corporation, Defendant, numbered E-244-Phoenix on the docket of said Court.

I further certify that the attached pages, numbered 1 to 53, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $6.50 and that said

sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the Seal of the said Court this 7th day of November, 1933.

[Seal] J. LEE BAKER,
Clerk. [50]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America—ss.

To MORRIS LaCOFSKE, Appellee:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within Thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the District of Arizona, in a suit wherein Leo A. Madden, Ancillary Receiver in the above-entitled action, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against said appellant should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable F. C. Jacobs, Judge of the District Court of the United States, this 14th day of August, 1933, and in the 158th year of the

independence of the United States of America.

.....

Clerk.

[Seal] F. C. JACOBS,
Judge of the District Court
for the District of Arizona.

SERVICE of a copy of the foregoing citation is acknowledged [51] this 15th day of August, 1933.

MARKS & MARKS
B. E. MARKS
Attorneys for Appellee. [52]

[Endorsed]: Filed Aug. 28, 1933. J. Lee Baker, Clerk, United States District Court for the District of Arizona. By George A. Hillier, Deputy Clerk. [53]

[Endorsed]: No. 7322. United States Circuit Court of Appeals for the Ninth Circuit. Leo A. Madden, Ancillary Receiver of Piggly Wiggly Yuma Company, a corporation, Appellant, vs. Morris LaCofske, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the District of Arizona.

Filed November 9, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7322

15

United States

Circuit Court of Appeals

For the Ninth Circuit

LEO. A. MADDEN, Ancillary Receiver of Piggly Wiggly Yuma Company, a corporation,

Appellant,

vs.

MORRIS LaCOFSKE,

Appellee.

Brief of Appellant

TOWNSEND, JENCKES & EDWARDS,
Phoenix, Arizona,
Attorneys for Appellant.

No. 7322

United States
Circuit Court of Appeals
For the Ninth Circuit

LEO. A. MADDEN, Ancillary Receiver of Piggly Wiggly Yuma Company, a corporation,

Appellant,

vs.

MORRIS LaCOFSKE,

Appellee.

Brief of Appellant

STATEMENT OF THE CASE

Appellant, Leo. A. Madden, on March 14th, 1932, upon his appointment by the United States District Court for the District of Arizona, as Ancillary Receiver of the defendant Piggly-Wiggly Yuma Company, a corporation, took into his possession, as such receiver, a certain grocery business carried on by said defendant in Yuma, Arizona, in a store building located upon land owned by the appellee Morris

LaCofske and leased by him to said defendant, as evidenced by two leases expiring July 1st, 1934, and October 6th, 1934, respectively at a monthly rental of $350.00. (T. R. pp. 8-9-10).

Appellant forthwith entered into possession of said leased premises and of the stock of merchandise and store fixtures contained therein belonging to said defendant and continuously conducted thereon the said grocery business until the 16th day of November, 1932, (T. R. p. 13), when the same was delivered over to one Herman J. Schwartz who paid appellant therefor the sum of $2250.00. (T. R. p. 20). Appellant paid appellee the full amount of rent stipulated in said leases, to-wit, $350.00 per month, covering the entire time of his occupancy of said leased premises. (T. R. p. 20).

On November 22nd, 1932, appellant, without notice, petitioned said court for an order authorizing the sale to said Herman J. Schwartz of said fixtures and stock of merchandise and the assignment to him of said leasehold interest in said premises for the sum of $2250.00, (T. R. p. 1-6), and on November 23rd, 1932, an order was entered herein authorizing such sale and assignment at private sale without notice, the same to be final, and that said sale and assignment were consummated. (T. R. p. 7).

Thereafter on November 30th, 1932, appellant notified appellee of said sale and assignment and that future demands for rent be made upon said Herman J. Schwartz. (T. R. p. 20).

On May 2nd, 1932, appellee filed with appellant his claim against the estate of defendant corpora-

tion, in which he demanded, among other things, rent for the full unexpired terms of said leases based upon the landlords' lien laws of the State of Arizona (par. 3671 Rev. St. Ariz. 1913 and par. 1958 Rev. Code Ariz. 1928.) (T. R. pp. 13-17).

On March 9th, 1933, appellee filed his petition herein (T. R. pp. 8-26) setting forth substantially the foregoing facts and further, without alleging fraud or collusion or knowledge on the part of appellant, averring that on December 3rd and 4th, 1932, the said Herman J. Schwartz, without the knowledge and consent of appellee, "moved out all the merchandise and much of the movable fixtures used in connection with said grocery business conducted in said leased premises aforesaid and the whereabouts of said merchandise and fixtures is unknown to your claimant," (T. R. p. 21) and praying the court to require appellant to pay forthwith rent accruing since November 15th, 1932, and a further sum estimated as the cost of restoring the leased premises to its original condition as covenanted in the lease, and to impress the funds realized from said sale in the hands of appellant with a lien for the payment thereof. (T. R. p. 26).

Appellant stipulated that the facts set forth in said petition were true and correct, and the issues were submitted to the court for determination of the questions of law raised thereby. (T. R. pp. 27-28).

Thereafter the court entered judgment, inter alia, that appellant "did not relieve himself of the liability to pay the rent to the landlord provided for in said leases by an assignment of said leases;" (T. R. p. 39), that appellee recover of and from appel-

lant $2975.00, being rent accruing from November 15th, 1932, to July, 1933; (T. R. pp. 39-40), that such judgment is a first lien on the amount realized by appellant from the sale of said merchandise and fixtures; (T. R. p. 40), that payment be made out of said moneys and the balance out of any other moneys coming into the hands of appellant; (T. R. p. 40), that appellee recover nothing from appellant as and for restoration of the leased premises; (T. R. p. 40), that as to liability for rent not yet accrued the court reserves that question to be determined in the light of future conditions. (T. R. p. 40).

ASSIGNMENT OF ERRORS

Appellant's Assignment of Errors set forth in the Transcript of Record (pp. 42-44) may be embraced within two assignments of fundamental error, which if found to be well taken, will sustain the collateral assignments, viz:

I.

The lower court erred in its conclusion of law that the appellant as receiver of the defendant corporation, Piggly-Wiggly Yuma Company, did not relieve himself of the duty and obligation to pay the rent to the landlord provided for in the leases described in said decree by assigning said leases, and in rendering judgment in accordance therewith against appellant in the sum of $2975.00 or in any sum. (T. R. pp. 39-40).

II.

The lower court erred in its conclusion of law that the appellee, landlord, is entitled to a first lien upon

the funds realized and received by appellant, receiver, from the sale of the merchandise and fixtures in said leased premises and in rendering judgment in accordance therewith impressing a lien upon such funds for the payment of its judgment for rent in the sum of $2975.00 in favor of the appellee. (T. R. p. 40).

PROPOSITIONS OF LAW

The appellant submits the following propositions of law upon which the foregoing assignments are predicated:

I.

A receiver who adopts a lease of property held by the insolvent and continues to occupy the same, becomes by operation of law an assignee of the term and is obligated to the landlord by privity of estate only to perform covenants of the lease running with the land during such time as he holds under the lease, and he may relieve himself of such obligation at any time by assigning the lease to a third person and delivering possession of the leasehold.

II.

One having a lien upon property in the hands of a receiver or other fiduciary which is sold by order of court, must look to the property alone for payment, and, in the absence of fraud or other circumstances justifying the application of equitable principles, cannot claim payment out of the proceeds of the sale unless such property be ordered sold free from such lien.

ARGUMENT AND CITATION OF AUTHORTIES

First Assignment:

It is to be noted that there was no express assignment of the lease from the defendant corporation to the receiver, nor did the receiver at any time expressly agree to become bound by the covenants of the lease. Whatever obligation arose therefore was created by operation of law as a result of the receiver taking possession of the leasehold and adopting the lease.

A comprehensive summary of the question of the liability of receivers as assignees of leases is found in Tiffany, on Landlord and Tenant, Vol. 1, beginning at page 987, an excerpt of which is quoted below:

> "The question of the liability of a receiver, as an assignee of the leasehold, upon the covenants of the lease, including that for rent, would seem, primarily, to depend on the question whether the title to property of that character is vested in the receiver by his appointment. Whether a receiver, by his appointment, obtains title to the property of which he is given control, is a matter on which the decisions are by no means in accord, but it seems that, by the weight of authority, a receiver is, apart from statute, to be regarded as a mere custodian and representative of the court, and not as having title to the property. So regarded, it does not appear that a receiver appointed for a tenant should, unless an assignment were actually made to him by the tenant, be held liable on the covenants of the lease as an assignee, and there are cases to that effect. The courts have, however, more usually regarded the receiver as lia-

ble on such covenants, as being an assignee by operation of law, (citing numerous cases, including Link Belt Mach. Co. v. Hughes, 174 Ill. 155, 55 N.E. 179; DeWolf v. Royal Trust Co., 173 Ill. 435; 50 N. E. 1049; Woodruff v. Erie R. Co., 93 N. Y. 609; Frank v. New York L. E. & W. R. Co., 122 N. Y., 197, 25 N. E. 332; Wells v. Higgins, 132 N. Y. 459, 30 N. E. 861), provided he has indicated an intention to accept the leasehold as a part of the assets of the insolvent tenant, but not otherwise, thus applying the same rule as is applied in the case of a trustee in bankruptcy and, by the American decisions, of an assignee for creditors. The cases are generally to the effect that the assumption of physical possession and control of the leased premises by the receiver does not show an acceptance by him of the leasehold interest, so as to impose liability on him as an assignee of the leasehold, but that he may retain possession for a 'reasonable time' and then give up the property if this seems expedient. But it is generally held or assumed that, apart from any question of the acceptance of the leasehold, the landlord is entitled to payment of rent, for the period of the receiver's occupation for the purpose of settling the estate, as one of the expenses of the receivership, at least to the extent of the earnings or the rental value of the property * * * * * * * * * Conceding that the receiver becomes liable for rent by retaining possession, he can terminate that liability by assigning over to some 'man of straw'."

The question of the liability of the assignee of a leasehold generally, is discussed in Tiffany on Landlord and Tenant, Vol. 1, pp. 987, et seq., as follows:

"The liability of the assignee of the leasehold on the covenants entered into by the lessee, though based primarily on 'privity of con-

tract,' as existing only by reason of such covenants, is also, in a sense, based on privity of estate, as being imposed on him by reasons of his ownership of the leasehold. Consequently, such liability endures only so long as this privity continues, and it comes to an end when the privity is ended by the assignment of the leasehold interest of the assignee to another, a 'reassignment' by him, as it is frequently expressed. (Citing numerous cases, including Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105; McKeon v. Wendelken, 55 N. Y. Supp. 626; and Mason v. Smith, 131 Mass. 510).

"The effect thus given to a reassignment by the assignee is not changed by the fact that it is made for the purpose of freeing him from liabality, or that it is made with knowledge on his part that his assignee is entirely insolvent, a mere beggar in fact, or is otherwise unable to perform the covenants of the lease. (Citing Johnson v. Sherman, 15 Cal. 287). * * * * * * * * * In order that the reassignment of the leasehold may relieve the assignee from liability, it is not necessary that the landlord be notified of the reassignment, or that he consent thereto, (citing Tibballs v. Iffland, 10 Wash. 451, 39 Pac. 102), and it has been held that the reassignment is effective for the purpose though it is in violation of a covenant of the lease not to assign without license, this according with the general rule that an assignment in violation of such a covenant is valid."

In the case of U. S. Trust Co. v. Wabash R. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1058, it was held that where a receiver elects to adopt a lease, a privity of *estate* is thereby created between him and the lessor, by which he becomes liable upon the covenant to pay the rent. This we have shown is the

general rule. A privity of *contract* is not created, however, between the receiver and the lessor. In Northwestern Mut. Life Ins. Co. v. Security Savings & Tr. Co., 261 Fed. 575, (U.S.C.C.A. Or. 1919), the liability of the assignee of a lease is recognized to be by privity of estate, and obligates him to perform covenants that run with the land.

The liability of the receiver in this connection would be, therefore, tantamount to that of an assignee of the lease. The leading authority in the state of Arizona, wherein the leased premises are located, is the case of McKee's Cash Store v. Otero, 171 Pac. 910, 19 Ariz. 418, which case was decided in 1918 and has never been overruled. In that case, the court quotes the following excerpts from Washburn on Real Property:

> "Such assignee, therefore, is not liable for any breach committed before he became assignee, nor for any such breach occurring after he has parted with the estate and possession to a new assignee, although he did this for the very purpose of escaping such liability, because by so doing he destroys the privity of estate on which it depends."

The court goes on to state the manner in which the assignee of the lease may escape liability, as follows:

> "If the McKee's Cash Store, as assignee, wished its liability to pay rent to continue only during its actual possession of the premises, it should have reassigned the lease as well as abandoned the possession. By so doing the privity of estate would have terminated."

In the instant case, the receiver did exactly this. The great weight of authority is in support of this proposition. In 35 C. J., p. 998, and cases found in the notes thereunder, the general rule is stated to be:

> "An assignment of the lease by the assignee thereof terminates his liabilities so far as they rest upon privity of estate, equity following the law in this respect. The rule applies, although the lessee has convenanted for himself and assigns not to assign without the lessor's consent, or although the assignment is for the purpose of avoiding the obligations of the lease or to an irresponsible party, but the assignment must be actual and valid, and have been accepted by the assignee. Notice to the landlord is not essential."

In conclusion, it appears that the lower court did not hold the appellant on the theory of privity of contract, for the reason he was held not liable on the covenant to restore the premises. (T. R. p. 40). The court necessarily, therefore, must have predicated his liability on the theory of privity of estate, which liability has been shown to have terminated.

Second Assignment:

The theory upon which the appellee asked the court to impress a lien upon the funds in the hands of the receiver realized from the sale of the merchandise and fixtures, and upon which the court entered its judgment impressing such lien thereon, was not that the appellee was entitled to invoke the equitable powers of the court to relieve him against fraudulent or inequitable conduct on the part of the receiver resulting in the destruction of the lien upon the property, nor that the receiver had sold

it free from his lien; but solely that the receiver by adopting the lease had obligated himself for the payment of the rent for the full term thereof regardless of whether or not he continued in possession of the leasehold. There was no showing of fraud or other inequitable conduct on the part of the receiver, neither was there any showing that the applee had lost his lien upon the property by reason of anything the receiver had done in the premises, such as selling free from the landlord's lien, or permitting removal of the property; and the judgment of the lower court in impressing a lien upon the proceeds in the hands of the receiver could only have been entered as a result of the conclusion reached by the court that the receiver had obligated himself for the payment of the rent for the full term of the lease. In so doing, the court lost sight entirely of the fact that the sale was made subject to the landlord's lien, that the property passed to the purchaser burdened with the lien, and that the landlord was thereby placed in no worse situation than he was in when the receiver took possession. Therefore, there was no basis upon which a court of equity could impress a lien upon the proceeds of the sale. If the receiver was obligated to pay the rent for the full term of the lease, as the lower court held, it was because he was bound thereto through privity of contract, and that obligation he could, of course, discharge by applying thereto any funds in his hands belonging to the estate, including proceeds from the sale, and, indeed, the court recognized this by ordering him to pay any surplus over and above such proceeds out of any other moneys coming into his hands (T. R. p. 40). Consequently, it was unnec-

essary, even in the view of the situation taken by the court, to impress a lien upon such funds.

Appellee may argue that the circumstances of the case entitle him to a lien upon the funds regardless of the basis upon which the court decreed it. We submit that such circumstances do not show appellee to be so entitled. It is true that in 36 Corpus Juris 503, par. 1483, under the title of Landlord and Tenant, may be found the following: "But if the property of the tenant is taken into the custody of the law and converted into money, the lien will attach to such proceeds." Five cases are cited as supporting the text. An examination of these cases discloses that in each of them the property was sold under circumstances cutting off and destroying the lien upon the property itself. We take this to mean, therefore, that where the entire property in the goods is sold, as distinguished from the equity therein above existing liens, the liens, thereby being cut off from the goods, are transferred to the proceeds.

The universal rule seems to be that when property in custodia legis is sold subject to existing liens, such liens cannot be transferred to the proceeds of the sale, and the reason for the rule seems obvious: if only the equity is sold less money is realized than if the entire property were sold, and to require the lien to be discharged therefrom is to enrich the purchaser at the expense of the estate.

> "The general rule is that the purchaser takes the property subject to whatever liens and encumbrances existed thereon at the time of the attaching of the lien under which the property is sold, and cannot have the proceeds of

the sale applied to discharge such liens." 35 C. J., p. 78, par. 121, under the title Judicial Sales. Also see Roberts v. Hughes, 81 Ill. 130, 25 Am. R. 270; Branham v. Long, 6 KyL 451; Sansbury v. Belt, 53 Md. 324; Vaughn v. Clark, 5 Nebr. 238; Coal v. Higgins, 23 N. J. Eq. 308; In re McKenzey, 3 Pa. 156; Bennett v. Booth, 70 W. Va. 264, 266, 73 SE 909, 39 LRANS 618.

This rule is recognized in bankruptcy proceedings.

"Where the property is sold subject to encumbrances, one having a lien on such property must look to the property alone for payment and cannot claim payment out of the proceeds of the sale." 7 C. J. 241, par. 377, under the title Bankruptcy. In re Gerry, 112 Fed. 957.

In Hayes v. Armstrong, 145 Md. 268, 125 Atl. 610, it was held that where land was sold by receivers under the court's order subject to complainant's mechanic's lien, complainant was not entitled to share in the proceeds.

The sale in this case was made in pursuance of an order of the court (T. R. p. 7) which did not authorize a sale free from existing liens, and in the absence of such authorization, was made subject thereto, this being particularly true because of the inclusion in the sale of the leasehold interest of the insolvent.

"In some jurisdictions the rule formerly prevailing that the court could not order a sale of property by the receiver free from encumbrances has been changed by statute . . . Where the authority given by statute is not exercised and the order to sell is general without mention of prior liens or encumbrances, a sale there-

under conveys the property and franchises subject to the lien of prior encumbrances." 14a Corpus Juris 1008, par. 3257, under the title Corporations. Hackensack Water Company vs. DeKay. 36 N. J. Eq. 548.

"As in other judicial sales, the general rule is that the purchaser takes the property subject to whatever liens and encumbrances exist against the property at the time the receiver was appointed, whether the property is sold expressly subject to encumbrances or is sold without mention of liens and encumbrances." 53 C. J. 224, par. 375, under the title Receivers. Also see Home Trust Co. v. Miller Petroleum Co., 27 F. (2d) 748; Weil v. Zacher, 92 Ill. A. 296; State v. Skinner, 81 Ind. A. 1, 142 NE 387; Hayes v. Armstrong, 145 Md. 268, 125 A 610; Federal Trust Co. v. Bristol County St. R. Co., 222 Mass. 35, 109 NE 880; Cashin v. Alamac Hotel Co., 98 N. J. Eq. 432, 131 A 117; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548; Matter of Coleman, 174 N. Y. 373, 66 NE 983; Edinburg Irr. Co. v. Paschen, (Commn. A.) 235 SW 1088; Houston, etc., R. Co. v. Ennis, (Civ. A.) 201 SW 256 (Certiorari den 252 U. S. 583 mem, 40 SCt 393 mem, 64 L. ed 728 mem, writ of error dism 256 U. S. 684 mem, 41 SCt 622 mem, 65 L. ed. 1171 mem).

"A receiver is not a bona fide holder; therefore, a purchaser at receiver's sale cannot be a bona fide purchaser, because he takes only the rights of the receiver, who in turn takes only the rights of the insolvent." Stram v. Jackson 248 Mich. 171, 226 N. W. 888, 892.

"Existing liens and encumbrances being in no way affected by the appointment of a receiver of the property subject thereto, the receiver ordinarily has no power to sell property free

> from such encumbrances, and the court having charge of the receivership ordinarily has no power to authorize or direct such a sale by the receiver except as power so to do may be conferred upon the court by statute. But when the court has jurisdiction of the property and of all the parties concerned and a sale of the property becomes expedient in the interests of all the parties, the court has power to order a sale free from such encumbrances, the lien thereof being transferred to the proceeds of the sale . . Such power should not be exercised, however, unless there is a reasonable prospect that the property will bring such a price as to leave a surplus over the secured debt for general creditors." 53 C. J. 209-210, par. 328, under the title Receivers. Seaboard Natl. Bank v. Rogers Milk Products Co. 21 Fed. (2nd) 414.

It becomes quite apparent, therefore, that the lower court, in entering its order authorizing the receiver to sell the encumbered property, did not intend that it be sold free from encumbrances. The receiver, in petitioning for the order of sale represented to the court "that the amount of rent to accrue under said leases far exceeds the value of said fixtures and stock of merchandise," (T. R. p. 4), and to have sold it free of the landlord's lien, transferring such lien to the proceeds, would have been an idle and useless procedure so far as any benefit to the general creditors is concerned.

The receiver had elected to treat the leasehold interest as an asset. He later determined it was to the best interest of the creditors and stockholders to dispose of the store. (T. R. p. 3). The purchaser was buying the store. (T. R. p. 6). This included the stock of merchandise, fixtures, and the leasehold

interest. There was no removal or segregation of the merchandise and fixtures by the receiver from the store, and there is no showing that he authorized the purchaser to remove the same from the premises.

In conclusion, we wish to observe that there is not the slightest suggestion in the record of any bad faith or misconduct on the part of the receiver throughout the entire transaction, and the lower court, under the facts before it, clearly did not, and could not hold him upon such a theory.

We respectfully submit, therefore, that the two assignments of fundamental error herein discussed, are well taken, and that the decree of the lower court should be reversed and set aside, and the petition of the appellee dismissed with costs to the appellant.

Respectfully submitted,

TOWNSEND, JENCKES & EDWARDS,

Attorneys for Appellant.

INDEX TO BRIEF

TABLE OF CASES CITED

TABLE OF STATUTES CITED

TABLE OF TEXTBOOKS CITED

No. 7322.

In the

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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Appellant,

vs.

Morris LaCofske,

Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

TABLE OF STATUTES CITED.

TEXTBOOKS AND ARTICLES CITED.

No. 7322.

In the

United States
Circuit Court of Appeals,

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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Since the facts set forth in the petition of Leah Goldsmith, attorney-in-fact for Morris LaCofske, appellee herein [T. R. pp. 8-27], has been stipulated to as being true and correct, [T. R. pp. 27-28] it is not necessary to set forth herein appellee's version of the facts, but they will only be referred to hereinafter by way of illustration when the occasion demands.

The importance of the question of the nature and extent of a receiver's liability upon a lease or other contract of the insolvent which he has affirmed or adopted, which question is presented in the instant case, is respectfully called to the attention of this Court. The problem is a vital one, and is made particularly so under present distressing economic conditions which necessitate the operation of many enterprises under equitable receiverships. Not only are the rights of the litigants herein involved, but also the rights of that large body of people, comprising creditors of insolvent enterprises, those who claim some interest in the property taken over, and those who succeed to the assets of the insolvent estate, either by purchase or otherwise. Counsel for appellant herein advances a theory which if approved by the Court would put it within the power of a receiver to disregard the legal rights of some parties concerned, without any right of redress on their part. If a receiver is legally permitted to disclaim all responsibility for his acts (a necessary consequence of the theory advanced by counsel for appellant herein), it is submitted that the door would be thrown wide open for the possibility of "receivership rackets" such as have not as yet been experienced. It is for this reason that counsel for appellee presents the situation here and the law applicable thereto at such length.

PROPOSITIONS OF LAW.

The appellee submits the following propositions of law which he believes are applicable to the instant case.

I.

An equitable receiver who adopts or affirms the lease of his insolvent, is liable to the lessor thereon for the entire term, and upon each and every covenant contained therein.

(a) A receiver does not by adopting or affirming a lease become an assignee of the lessee thereunder by operation of law.

(1) He does not take title to the property, and he is not an assignee of the term.

(2) There is no privity of estate between him and the lessor, and he is not liable upon the covenants by reason of such privity.

(b) A receiver is substituted, in effect, for the original lessee upon his adoption or affirmance of a lease contract.

(1) This is apparent from the language of the decisions.

(2) It is apparent from the fact that the decisions have held a receiver liable for breaches occurring under the lease PRIOR to his adoption thereof.

(3) It is apparent from the fact that the decisions have held that the receiver adopts the lease *in toto,* with all of its terms, conditions and covenants, and for the entire term.

(4) It is apparent from the application of equitable principles and considerations.

II.

One having a landlord's lien upon the personal property of the lessee on the demised premises, is entitled to assert his lien against the funds of his insolvent lessee in *custodia legis*.

(a) He has a statutory right.

(b) He has an equitable right.

I.

An Equitable Receiver Who Adopts or Affirms the Lease of His Insolvent Is Liable to the Lessor Thereon for the Entire Term, and Upon Each and Every Covenant Contained Therein.

(a) A Receiver Does Not by Adopting a Lease Become an Assignee of the Lessee Thereunder by Operation of Law.

It is true that numerous statements may be found in the language of the courts to the effect that a receiver is the assignee of the lease, ("Adoption and Rejection of Contracts and Leases by Receivers", 46 Harvard Law Review, pp. 1111-1136, by Ellsworth E. Clark, Henry E. Foley and Oscar M. Shaw, of the New York Bar; 1 Tiffany, Landlord & Tenant, p. 984). That this statement is correct only if limited to cases where the title to the property of the insolvent is vested in the receiver, either by statute, the order of appointment, act of the parties, or some other means, is recognized in numerous cases.

The question of a chancery receiver's liability on a lease which he has affirmed was fully discussed in the case of *Quincy, etc., Ry. Co. v. Humphreys,* 145 U. S.

82-101, 12 Sup. Ct. 787, 792, 36 L. Ed. 632. The distinction which is taken in the case at bar was argued on behalf of the trust company in *U. S. Trust Company v. Wabash Ry. Co.,* 150 U. S. 287, 14 Sup. Ct. 86. His liability rests, not on an equitable assignment to the receiver of the unexpired term, but *on the fact of the adoption of an existing contract.* (See cases cited in *U. S. Trust Co. v. Wabash, supra;* Clark on Receivers, p. 602, Sec. 443.)

That the receiver is not an assignee of the term, as contended for by counsel for appellant herein, seems to be settled. The Court said, in discussing this question in *Dayton Hydraulic Co. v. Felsenthall,* 116 Fed. 961, at page 964:

> "In the absence of any statute casting the title upon the receiver, or some assignment made by the lessee, it is difficult to see how a judicial receiver can in any accurate sense be said to be the assignee of the term. There is no privity of estate between such a receiver and the lessor, as the appointment neither changed the title or created any lien on the property. These principles are well settled (citing cases) * * * *That a chancery receiver is not an assignee of a term is thoroughly settled in New York.** *Stokes v. Hoffman House,* 174 N. Y. 554, 60 N. E. 667, where the New York cases are reviewed."

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* Unless otherwise indicated, all italics are ours.

Again, in *Bell v. American Protective League,* 163 Mass. 558, 40 N. E. 875, 47 Am. St. Rep. 481, 28 L. R. A. 542, the Court pointed out that a receiver is not, in the absence of statute, an assignee of the term:

> "It is a familiar doctrine of the common law that, while there is no privity of contract between the lessor and the assignee of a term, there is a privity of estate, which renders the assignee liable upon the covenants of the lease, so long as he holds the term. This applies not only to private individuals, but to assignees in bankruptcy and insolvency, as the title to the leasehold estate vests in them, provided they take possession. But an assignee of a term or an assignee in bankruptcy may, by assigning the term, free himself from all further responsibility; and this assignment may be made to any one, however irresponsible he may be, provided the assignor does not retain any interest in the thing assigned. See 2 Platt, Leases, 400-452.
>
> "*It is difficult to see upon what principle a receiver,* in the absence of a statute vesting the title to the insolvent in him, *can, in any legal sense, be said to be the assignee of a term.* In *Ellis v. Boston, H. & E. R. Co.,* 107 Mass. 1, 28, it was said by Mr. Justice Wells, speaking of a decree of this court appointing receivers of a railroad company: 'It had no effect to change the title or create any lien upon the property. Its purpose, like that of an injunction *pendente lite* was merely to preserve the property until the rights of all parties could be adjudged. The receivers are officers of the court for this purpose, and act under its direction and control'. A receiver is merely a ministerial officer of the court, or, as he is sometimes called, the 'hand of the court'. The title to the

property does not change; and, if he is required to take property into his custody, such custody is that of the court (citing cases).

"The question now before the court was carefully considered in *Gaither v. Stockbridge*, 67 Md. 222, and it was held, as a necessary deduction from the principles which we have stated, that a receiver, by taking possession of a leasehold estate, did not become the assignee of the term. This case was cited with approval by Chief Justice Fuller in the case of *Quincy, M. & P. R. Co. v. Humphreys,* 145 U. S. 82, 97, 98; 36 L. Ed. 632, 637."

It is to be noted that in the *Bell* case the receiver had gone into possession, but he did not adopt the lease, and the case is authority for the proposition that he did not become an assignee of the term merely by *such taking of possession.*

In *Underhill v. Rutland, R. Co.,* 98 Atl. 1017, plaintiff sued as receiver of a foreign corporation. The state statute required a foreign corporation to file a certificate and pay an annual license tax, and in default of meeting such requirements, neither it "nor its assignee" could sue upon contracts made by it. The defendant contended that the corporation could not sue because it had failed to meet these requirements, and that the receiver was not an assignee of the corporation. The Court said:

"So the question of permitting the amendment (to the writ) cannot be disposed of without considering the source of the receiver's right to the assets of the corporation, and the relationship he sustained to the suit if the writ is amended as proposed.

"We think the receiver is not an assignee of the corporation, nor a person claiming under it, in the ordinary sense of the terms, or within the meaning of the statute, and so not within the prohibition. The receiver derives his authority and possessory rights in the property from the court appointing him, and not from any act of the corporation. *Murtey v. Allen,* 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779. His possession of the property is the possession of the court by him as its officer. *Thompson v. Phoenix Ins. Co.,* 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408. *The ordinary chancery receiver is not an assignee, but a ministerial officer appointed by the court to take possession of and preserve the property or funds in liquidation.*"

The Court said, in connection with this question in *Gaither v. Stockbridge,* 67 Md. 222, (after setting forth the nature of the office and duties of a receiver and his relationship to the court):

"It is manifest that the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency. In the case of an assignee in bankruptcy, the law casts upon such assignee the legal title to the unexpired term of a lease, and he thus becomes assignee of the term by operation of law, unless, from prudential considerations, he elects to reject the term as being without benefit to the creditors. But not so in the case of a receiver, unless it be, as in New York and some of the other states, where, by statute, a certain class of receivers are invested with the insolvent's estate, and with powers very similar to those vested in an assignee in bankruptcy. * * * *But he (the receiver) does not by taking such possession, become*

assignee of the term in any proper sense of the word. He holds that, as he would any other personal property involved for and as the hand of the court, and not as assignee of the term."

It was held in *N. Y. T. & Or. Co. v. N. Y.*, 58 Fed. 268, that a receiver is not an assignee.

Clark on Receivers, p. 459, Sec. 341, says:

> "The analogy between the title of an assignee and a receiver to property is not complete. It is not open to debate that title to the debtor's property does not vest in the receiver. * * *"

There is no question in the case at bar that the receiver did not take title to the property upon his appointment. (Rev. Code Ariz. 1928, Secs. 3881 to 3884, inclusive.)

The case of *Dietrick v. O'Brien*, 122 Md. 482, 89 Atl. 717, is direct authority for the proposition that a receiver who has adopted a lease is not an assignee of the term.

In that case the receiver had adopted a lease, was in possession for the full period thereof, and held over. The landlord contended that there was a holding over from year to year, and not from month to month (which, if true, would make the receiver liable for rent on a yearly basis rather than on a monthly basis) and the Court pointed out that the only theory upon which such a contention might be sustained would be that the receiver was an assignee of the term. It was squarely held in that case that a receiver who has adopted a lease is not an assignee for the term.

It is thus seen that a chancery receiver does not become an assignee of the term by reason of his taking possession nor does he do so by reason of his having adopted the lease.

Therefore, the position taken by counsel for appellant is seen to be based upon a proposition which is not supported by law.

The statement is further quite often made to the effect that the receiver upon the adoption of a lease becomes liable upon the covenants to pay the rent, privity of estate being thereby created between himself and the lessor. Counsel for appellant cites the case of *U. S. Trust Company v. Wabash Ry. Co.,* 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1058, (Brief of Appellant p. 8) in support of his proposition No. I.

The statement relied on is as follows:

> "If he elects to adopt a lease the receiver becomes vested with the title to the leasehold interest and a privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenants to pay rent."

Attention is called to the language of the Court in the case of *Stokes v. Hoffman House,* 167 N. Y. 554, 60 N. E. 657, 53 L. R. A. 870, as follows:

> "Much stress is also laid upon the case of *U. S. v. Wabash etc.,* 150 U. S. 287, 37 L. Ed. 1085, 14 Sup. Ct. Rep. 86. It is there stated: 'If he elects to adopt a lease the receiver becomes vested with the title to the leasehold interest and a privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon

the covenants to pay rent." This statement was made on an application in the foreclosure suit in which the receiver was appointed. It may well be, therefore, that the Court intended to assert only what would constitute an equitable claim of the lessor upon the funds in court. As a matter of fact, the lessors were not allowed the rental of the whole period during which the receiver was in possession of the leased railroad, but only for rent accruing subsequent to an order made by the court in an application by the lessors, that the receiver either pay rent or surrender the road. If the right of the lessor to rent depends upon privity of estate between the receiver and the lessor, it is not entirely clear how this result was reached. That the case was really disposed of on equitable consideration appears from the conclusions of the opinion: * * *"

It is thus seen that the foregoing quotation from the *United States Trust Company v. Wabash, etc. Line, supra*, is not determinative of the question of the legal relationship which arises between the lessor and the receiver upon adoption of the lease of his insolvent. See, also, "Adoption and Rejection of Contracts and Leases by Receivers", *supra*, in which article and the cases there cited, it is pointed out that the statements that "the receiver becomes vested with the title to the leasehold estate and a privity of estate is thereby created, by which he becomes liable on the covenants to pay rent" are dicta, and as a premise in reasoning, their value is doubtful.

Counsel for appellant cites Tiffany on Landlord and Tenant, Vol. 1 (Brief of Appellant, pp. 6-7) in support of his proposition No. I. A careful reading of the

quoted section and examination of all of the cases cited by Tiffany in support of his statement convinces us that it does not support the proposition (Appellant's Brief p. 5) contended for. Tiffany states in part:

> "The courts have more usually regarded the receiver as liable on such covenants, as being an assignee by operation of law, provided he has indicated an intention to accept the leasehold as a part of the assets of the insolvent tenant, but not otherwise, thus applying the same rule as is applied in the case of a trustee in bankruptcy and, by the American decisions, of an assignee for creditors."

It is to be noted that three of the five cases cited by Tiffany (Appellant's Brief, p. 7) are cases arising in New York where, as pointed out by the Court in *Bell v. American Protective League,* 163 Mass. 558, 40 N. E. 857, 47 Am. St. Rep. 481, 28 L. R. A. 452: "There are many cases in New York in which it is asserted that there is no difference between an assignee and a receiver who takes possession of leasehold premises. We understand, however, that in New York a receiver of an insolvent corporation has vested in him by statute the title to the insolvent. (Citing cases.)"

It is respectfully called to the attention of the Court that the receiver in the case of *Link Belt Machine Co. v. Hughes,* 174 Ill. 155, 55 N. E. 179, cited by Tiffany in support of the proposition, was held liable on the covenants contained in the lease, but he was held liable *because of the act of adoption,* and the question as to whether or not he became thereby assignee by operation of law was not discussed.

It is respectfully submitted for the consideration of the Court that in the case of *Dodd v. Boyd*, Fed. Cas. No. 3,953, 17 Blatchf. 455, 5 N. Y. S. R. 1, also cited by Tiffany in support of this proposition of law, there is no discussion of whether or not the receiver is an assignee by operation of law, but on the contrary the Court places the liability of the receiver squarely upon the fact that he exercised his election not to reject the lease.

That Tiffany in his work on Landlord and Tenant (p. 982) did not have in mind such a construction upon the phrase "being an assignee by operation of law", as is contended for by counsel for appellant in the instant case, is apparent when read in connection with the balance of the language of that sentence as follows: "provided he has indicated an intention to accept the leasehold as a part of the assets of the insolvent estate, but not otherwise." This language implies *action* by the receiver. Thus the receiver's liability "on such covenants, as being an assignee by operation of law"—using the term "assignee by operation of law" in its technical sense—is not equivalent to the liability of the receiver upon the adoption by him of a lease, will be hereinafter discussed.

Counsel for appellant quotes further from Tiffany (Appellant's Brief p. 7, beginning with the language "The cases are generally to the effect," etc., to the end of the quotation on the same page of his brief.

This language is entirely inapplicable to the situation presented here, for the question is not whether the receiver accepted the leasehold. It was stipulated to by respective counsel that the lease was affirmed. [T. R. p. 24.] Therefore, since the fact of adoption is not dis-

puted, the balance of the language quoted by counsel for appellant does not help him in sustaining his position.

Furthermore, it having been shown that the term "assignee by operation of law" has been loosely used in the decisions, that there is no *decision* sustaining counsel's contention that a receiver is an assignee, and that, on the contrary, it has been squarely held that a receiver who has adopted a lease is *not* an assignee by operation of law (*Dietrick v. O'Brien, supra*), the balance of the quotation from Tiffany on Landlord and Tenant, Vol. 1, p. 987 (Appellant's Brief, p. 7), is entirely inapplicable, as well as the reasoning of counsel (Appellant's Brief, pp. 8, 9 and 10).

(b) A Receiver Is Substituted, in Effect, for the Original Lessee Upon His Adoption or Affirmance of a Lease Contract.

(1) *This is Apparent From the Language of the Decisions.*

In *Gilbertson v. Northern Trust Company* (N. D.), 207 N. W. 42, 42 A. L. R. 1353, the court said:

> "A receiver takes the estate of an insolvent for the benefit of creditors; he is in effect an assignee and *stands in the shoes of the insolvent with exactly the same rights and obligations that the latter had at the moment of insolvency.* Therefore, choses in action pass to him subject to any right of setoff existing at the time of the appointment."

Again, in *O'Dell v. Bedford,* 224 Fed. 996, the Court recognized the above principle in the following language:

> "It may be assumed that under the decisions of *Eamps v. Claflin Co.,* 220 Fed. 190, and *Atchison,*

Topeka & Santa Fe Ry. Co. v. Hurley, 153 Fed. 503, an election for continuance of a contract would have been subject to its burdens as well as its benefits and the receiver would have had to elect whether the Railroad Company and the receiver have been able to pay all the contract debts, obligations and charges."

The Court said in *Bryan, Jr. v. Bandy Realty Co.* (Cal. 1932), 11 Pac. (2d) 873:

"* * * When by the receiver elected to proceed with the work he did so just as Kriedt, the insolvent, would have done, subject to the rights of plaintiff under Kriedt's assignment and subject to defendant's right of setoff by virtue of his acceptance of the assignment. * * * After doing the contract, the receiver stood in the shoes of Kriedt, and defendant could no more relieve itself of its positive obligation to plaintiff by settlement of its account with the receiver than by a settlement with Kriedt himself in derogation of the accepted assignment. (Citing cases.)"

(2) *That the Receiver Is Substituted, in Effect, Is Apparent From the Fact That the Decisions Have Held a Receiver Liable for Breaches Occurring Under the Lease* PRIOR *to His Adoption Thereof.*

The only theory upon which the Court can possibly come to the conclusion that a receiver, upon adoption, becomes liable for the breach of a covenant upon a lease *occurring prior to the act of adoption* is that he, the receiver, was substituted in effect for the original lessee; for otherwise, the lessor would still have a right of action against the original lessee for such breach, and not against the receiver.

In *Andrews v. Beigel,* 6 Ohio App. 427 (1915), a receiver was appointed to take charge of a brewing establishment, and in the course of operating such business he caused receiver's certificate to be issued. The lessors of the property upon which the establishment was conducted petitioned the Court that unpaid rentals, accruing before the adoption of the lease be declared prior to said receiver's certificate. The Court said:

> "Where, before the appointment of a receiver, property has been held under a lease, and the receiver takes possession, he will be given a reasonable time to determine whether he will accept under the lease or not. If he does so accept, he will be bound by the terms of the lease. * * * A careful consideration of the record convinces the court that it must be held that the receiver took under the terms of the said lease, and that under the order of the court as made on December 24th, 1910, and December 18, 1911, *both the accrued rentals prior to the receivership* and those unpaid accruing since the appointment of the receiver, are obligations of the receiver."

In *Westinghouse Elec. & Mfg. Co. v. Brooklyn Rapid Transit Co.,* 6 Fed. (2d) 547 (1925), the Court said:

> "If the receiver is not *virtute officii,* the assignee of the term, if he remains a stranger to the lease until he adopts it, he must, upon definitive action of adoption or rejection, *be held to have occupied from the beginning the same position that he ultimately assumed.* If he rejects, he must act from the beginning as one who rejects, and if he assumes, he must from the beginning, conform to the terms of the contract he has assumed."

In *Neate v. Pink,* 3 Mac. & G. 476, 21 L. J. Ch. N. S. 574, 16 Jur. 69, 42 Eng. Rep. 345, the receivers had adopted a lease upon a plantation which was held by several persons. The receiver was appointed over one moiety (*Estate of Hiatt*). In that case the estate of the insolvent was held liable for rent amounting to 2800 pounds with interest at 6%, found due by the Master appointed, which sum included a number of years' rent owing under the lease at the time the receiver took possession and adopted the lease.

The same result was reached in the case of *Johnston v. California-Washington Timber Co.,* 296 Pac. 159. There a logging company became insolvent and a receiver was appointed to take charge of the affairs of the business. The receiver adopted the contract between the logging company and the timber company and continued performance thereof. Appellant contended that the receiver had no right to pay any claims that arose under the contract prior to its adoption. The Court said, in this connection:

> "* * * But, when a receiver becomes possessed of premises belonging to an insolvent lessee or tenant, if he adopts the contract, or ratifies it, he becomes liable according to the terms of the contract. That is the effect of one of the cases cited by appellant, *DeWolf v. Royal Trust Company,* 173 Ill. 435, 50 N. E. 1049-1050 (citing from the DeWolf case, hereinafter quoted from, to the effect that 'neither courts nor receivers have any right to destroy contracts or violate obligations'). There is nothing to the contrary in the cases cited by appellant. *Central Trust Co. v. Continental Trust Company of City of New York,* 86 Fed. 517; *Dayton Hydraulic Co. v. Felsenthal,* 116 Fed. 961; *Barber Asphalt Co. v. 42nd*

Street etc. Railway Co., 175 Fed. 154; *Mathews v. Butte Machinery Co.*, 286 Fed. 801; *Spencer v. World's Columbian Exposition*, 163 Ill. 117, 45 N. E. 250. * * * The logging company certainly was bound under the contract to furnish the 2,000,000 feet of logs, and the timber company was entitled to the $3.00 a thousand for the use of any logs in the river. The receiver, having adopted the contract and assumed its performance, *was also bound by its burden to do the same thing that the logging company would be required to do.* The logs sold by the logging company prior to the receivership had not all been paid for, and the balance due was merely a balance due on the entire quantity of logs."

Was not the receiver, then, substituted for the logging company under the contract? If not, how could he, rather than the logging company, be liable for obligations under the contract which arose before the receiver adopted?

It is submitted, upon principle, that if the receiver had not been, in effect, substituted in the place of the original lessee that a right of action would have existed against the latter, but it is significant that neither in this particular case nor in any other, so far as diligent search reveals, has such a contention ever been made.

See, also:

Hanna v. Florence Iron Co., 118 N. E. 629.

The decisions of the Courts to the effect that the *appointment* of a receiver does not relieve the lessee of liability to pay rent is quite consistent with the position taken by appellee herein. (See *Bradner v. Noeson* (Cal.), 12 Pac. (2nd) 84.) A chancery receiver, as hereinbefore

pointed out, is merely a custodian of the property and does not take title by virtue of his appointment. It is only upon the election by the receiver to affirm the lease that he is substituted, in effect, for the lessee. Generally, however, where the appointmnt of a receiver is obtained at the request of the landlord the lessee is excused from the payment of rent during such dispossession on the ground that such acts on the part of the landlord constitute an eviction and is inconsistent with the landlord-tenant relationship. *Telegraph Ave. Corp. v. Raentsch* (Cal.), 269 Pac. 1109, 61 A. L. R. 366. Similarly, is not the adoption of a lease by the receiver inconsistent with the lessee's possession?

(3) *That the Receiver Is Substituted for the Lessee Is Apparent From the Fact That the Decisions Have Held That the Receiver Adopts the Lease in Toto, With All of Its Terms, Conditions and Covenants, and for the Entire Term.*

The cases are uniform in holding that upon the adoption of a lease or other contracts by a receiver, he adopts it in its entirety, and he is bound by all of its conditions, terms and covenants, and for the entire term thereof.

In *Jacob v. Roussell,* 156 La. 171, 100 So. 295 (1924), the plaintiff leased a plantation on a yearly rental basis. Thereafter the lessee went into the hands of a receiver, who adopted the lease and operated under it for a year and then surrendered. The owner sublet for a portion of the period, and seeks to recover from the receiver the difference between the amount so recovered and the rent fixed in the lease.

"Had the receiver, when appointed, elected not to assume the lease and operate the plantation, it is clear that all that would have remained to plaintiff would have been a claim for damages against the corporation, with the rank of an ordinary creditor. On the other hand, had the receiver elected to operate the plantation for the full term of the lease, plaintiff's claim for the rent for the whole of the term would have been a charge against the receiver as such. (*Spencer v. World's Columbian Exposition Co.,* 163 Ill. 117, 45 N. E. 250; *Howe, Receiver, v. Harding,* 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17; *Commercial Pub. Co. v. Beckwith,* 167 N. Y. 329, 60 N. E. 642.)

The above propositions do not appear to be disputed. In fact, the receiver has acted thereon by paying in full the rent for the year during which he operated the plantation. *But the question arises whether a receiver can adopt a contract in part and repudiate it for the rest; whether he may divide a contract, taking so much thereof as he believes advantageous, and rejecting that which he deems unprofitable.*

On this point we have been furnished with no authority by either side, and we ourselves have been unable to find anything in point. But we are of opinion that the receiver cannot so divide a contract, and must take it or reject it as a whole, unless such contract be clearly separable and not entire.

And we think that a lease of lands for a term is one entire contract, even though the rent be payable in installments at intervals, and not a series of separate contracts each for a period equal to the interval between payments."

The Court stated that there was special reason why the lease there should be considered not separable, pointing out that the leased property was to be cultivated in rice and that only every three or four years a crop was profitably grown.

> "And our conclusion is that the receiver, having taken advantage of the lease for the year when a good crop could be raised, was not at liberty to surrender the land for the years when the crop might be poor. This appears to us the only *equitable* solution of the issue; and, as we find no positive law or jurisprudence in point, we must adopt it."

The *Jacob v. Roussell* case just quoted from is authority for the proposition that the receiver cannot repudiate the obligations assumed under the lease he elected to adopt and he is primarily liable thereon until the end of the term.

The receiver in the instant case would do the same thing the receiver in the *Jacob v. Roussell* case attempted to do, and that is, to accept the lease for whatever period suited his convenience and during which he might reap a benefit therefrom, and then repudiate the same and be relieved of any further liability thereon. In the instant case the receiver would adopt the lease during the period he is operating the business, and then would repudiate it when he found a purchaser for the store. The reasoning of the Court in the *Jacob v. Roussell* case is particularly applicable to the situation presented here.

In *De Wolf v. Royal Trust Company, supra,* the Trust Company was appointed receiver of the Smith Company, adopted the lease of the company and paid rent at the rate

of $75.00 a month, as specified in the lease. The receiver, under a provision in the lease, served a notice that it would surrender the premises and paid rent for the time that it was in possession. The lease specified that the rent was payable monthly in advance, which sum the lessors claimed.

> "The only question here is whether the court erred in refusing to allow the claim of $75.00, and holding the receiver not bound by the covenants of the lease. The decision, in effect, was, that the receiver could accept the leasehold interest vested in it by the order of appointment without becoming bound by the terms of the lease, and could remain in occupancy under the lease for so much of the term as it might choose, and, at its pleasure and election, abandon the premises and surrender the lease. The rule is that a receiver does not simply, by virtue of his appointment, become liable upon the covenants of a lease made prior to his appointment by the party for whom he is receiver, but he has a right to elect whether he will accept the lease, and make it his own, or whether he will refuse to accept it. It might be that it would be valueless for the purpose of the trust, or even a burden, and, if so, it could not be forced upon him. It is for this reason, that he has, subject to the order of the court, the right of election whether he will perform the covenants or not. For the purpose of making such election, he is entitled to a reasonable time to ascertain whether the lease would be desirable. The mere acceptance of the trust does not render a receiver liable for rent of the premises, and he cannot be held until he elects to hold possession as receiver, or does some act which is equivalent to such election. *Spencer v. World's Columbian Exposition Co.*, 163

> Ill. 117, 45 N. E. 250. If he remains in possession beyond a reasonable time to make the election, he, by implication, elects to accept the lease, *and becomes bound, as receiver, under its terms; and the remedy of the landlord for rent may be sought against the estate of which he is receiver.*"

The receiver becomes bound by the lease when he choses to continue it in effect.

In *Link Belt Machine Co. v. Hughes*, 174 Ill. 155, 55 N. E. 179, the owner of premises leased to a corporation, with a lien expressly provided for in the lease upon all property of the lessee, and the corporation was subsequently placed in the hands of a receiver. The lessee was not delinquent in his rental payments when the receiver took possession, and the receiver paid the first month's rent in the amount specified in the lease. The lessor thereafter claimed a preference on the funds in the hands of the receiver for rent subsequently becoming due. The Court found as a fact that there had been an adoption of the lease. With respect to the effect of adoption the Court said:

> "The parties have a right to enter into a contract of this nature, and it was binding upon the lessor and lessee. When the receiver took possession under the order of the Court the lease was not changed. The Court having ordered the receiver to occupy the leased premises under the lease the receiver took the property subject to the same terms and conditions as it was held by his insolvent. If Appellee had a lien against the property for rent he also had a lien against the property after it thus passed into the hands of the receiver."

See also *Fatheringham v. Spokane Savings Bank* (Wash. 1933), 27 Pac. (2nd) 139; *Greenstan & Greenberger v. Doerke Company,* 168 Atl. 396, affirmed 164 Atl. 471.

The rule is stated in 53 *Corpus Juris* at page 151, as follows:

> "When a contract is adopted and assumed by a receiver it becomes a contract and obligatory upon him as an officer of the court, payments becoming due thereunder being properly treated as part of the expenses of the receivership, and it must be carried out in all respects, with its burdens as well as it benefits; (citing cases) * * *
>
> "In accordance with the rules applicable to obligatory contracts generally, a receiver cannot abrogate or affect the rights of the parties under an unexpired lease made to the insolvent prior to the appointment of the receiver; but he has the option, under the supervision of the court, to adopt and assume the lease, or not to do so, and he is not bound by the covenants of the lease unless he elects to adopt and affirm it (citing cases) since he is not vested with title to the property of the insolvent and so cannot be regarded as an assignee of the term by operation of law (citing cases)."

High, Receivers, (4th Ed.) sec. 283a:

> "Upon the other hand, while the mere acceptance of the trust will not render the receiver liable, yet where, by his unequivocal acts, he has indicated an intention to receive and accept the benefits of the contract of his principal, he will be held to have elected to be bound thereby and accordingly he becomes subject to the liabilities thereby created.

(*Spencer v. World's Columbian Exposition*, 163 Ill. 117, 45 N. E. 250), and where a receiver has taken possession of the demised premises under a lease of his principal and has remained in possession after the lapse of a reasonable time in which to make his election he will be held, by implication, to have accepted the lease and to be bound thereby; *and having thus become bound by the covenants of the lease he is held to have adopted it as a whole, and he cannot afterward escape liability as to the unexpired portion of the term by serving notice upon the lessor and surrendering the possession.* (*DeWolf v. Royal Trust Company*, 173 Ill. 435, 50 N. E. 1049), *and in such case where the lease provides that the lessor shall have a lien for rent upon the property of the lessee and the receiver has taken possession and adopted the lease, he is bound by the provision, and the lessor is therefore entitled to a lien upon the proceeds of the sale of the insolvent's assets for the payment of all rent due under the lease.* (*Link Belt Machine Co. v. Hughes,* 174 Ill. 155, 55 N. E. 179.) But where a receiver has surrendered the demised premises upon the expiration of the receivership, he cannot be held personally liable under the lease for rent accruing thereafter since no privity exists between him and the lessor which could render him personally liable. (*Johnson v. Robuck,* 114 Ia. 530, 87 N. W. 491.)"

Attention is called to the fact that in *Johnson v. Robuck,* cited by *High, supra,* there was no adoption of the lease.

It was held, in *Spencer v. World's Columbian Exposition,* 163 Ill. 117, 45 N. E. 250, that the receiver could not, where he had taken possession of the premises and conducted the business which the insolvent had been un-

able to continue, and, without any act of disaffirmance or notice that he would not be bound by the contract, complete the term and receive profits, and all the benefits from such possession and continuance of the business, (being an adoption implied from his conduct) then repudiate the contract and pay only on the basis of a *quantum meruit.*

Again, in *Dietrick v. O'Brien, supra,* the receiver having adopted the lease was in possession for the term and held over after its termination. The question was as to the nature of the holding over after the leasehold term expired. The Court used the following language in considering the effect of adoption:

> "It is then, by the best-considered cases, established that if a receiver adopts the lease, he is held bound to the payment of the rent as stipulated by the lease, * * * It must not be lost sight of that a receiver is merely an arm of the court assisting in winding up the affairs of the insolvent and protecting the interests of the creditors. *If he sees fit to adopt the lease, he does so for the fixed and definite period. * * * We are of the opinion that when he adopts the lease, then he is liable on all the covenants up and until the end of the term,* but that thereafter, without any further agreement or action upon the part of either the lessor or receiver, all the law would imply would be a tenancy at will."

(4) *That the Receiver Is Substituted, in Effect, for the Lessee Upon His Adopting the Lease Is Apparent From the Application of Equitable Principles and Considerations.*

The parties herein are before a court of equity in an equitable proceeding, and equitable principles govern here. It is provided that

> "In all matters relating to the appointment of receivers, to their powers, duties and liabilities, and to the power of the court, the principles of equity shall govern, whenever applicable." (Sec. 3884, Ariz. Rev. St. (1928).

That the receiver at all times was in an advantageous position, and the lessor was at a disadvantage, is apparent upon consideration of the situation in receivership proceedings generally, and as it existed in the instant case in particular.

The receiver, upon his appointment, has the election of affirming or disaffirming leases and contracts of the insolvent. Here, he had a period of three months [T. R. p. 24] within which to determine what contracts and leases he desired to adopt. The receiver is generally given a reasonable period within which to determine whether or not he will consider the executory contracts of the insolvent to be of benefit to the receivership, and if he does elect to adopt, the lessor has no choice, but must perform. He has no alternative.

If the receiver had rejected the lease in the instant case, the lessor would have had several remedies which he could have pursued at that time. He would have had a right to assert his statutory landlord's lien upon all of

the lessee's merchandise, fixtures, furniture and all other personal property upon said premises to secure the payment of the rent for the full term of said leases, as well as to secure the performance of all of the terms of said leases. [T. R. pp. 17-18.] His lien, if asserted at that time, would have been a preference over all other claimants, and its value would be measured by the value of the property upon the demised premises.

In *Fee-Crayton Hardwood Co. v. Richardson-Warren Co.,* 18 F. (2d) 617, the owner of premises executed a lease thereof to a mill and lumber company which subsequently was placed under receivership. A statutory landlord's lien was in effect in Louisiana, giving the lessor a lien and pledge upon all of the property situated upon the property at the time of the execution thereof or that was subsequently placed upon the premises, for the payment of the rent, whether due or to become due. The landlord intervened, claiming a preference against the fund in the hands of the receiver over all other claims presented. The Court held that his claim was a first lien upon the funds, prior to all other claimants.

In *Link Belt Machine Co. v. Hughes,* 174 Ill. 155, 55 N. E. 179, appellee, owner of premises, leased to a corporation, with a lien expressly reserved upon all the property of the tenant. The corporation was subsequently placed in the hands of a receiver. The Court held that the lessor was entitled to a preference over the demands of all other claimants, and costs of administration.

The nature and extent of the statutory landlord's lien given in Arizona (Ariz. par. 3671 Rev. St., 1913; Ariz., par. 1958 Rev. Code Ariz. 1928) was considered in

Murphey v. Brown (Ariz.), 100 Pac. 801. In that case Murphey leased a portion of the building owned by him to Brown, who later became insolvent and made an assignment for the benefit of creditors to S, who sold the entire stock of goods on the premises to F, who immediately entered into possession and advertised that he would sell the stock at public auction, at *greatly reduced prices*. Murphey claimed his lien. The Court, in discussing the rights of Murphey under this lien law, stated:

> "To restate the question: Is the landlord under this statute protected for the payment of his rent from the moment his tenant's chattels are placed upon the leased premises, or does his protection begin only after the obligation for rent has matured? If the latter, then the landlord is but little aided by the statute; for he may obtain a lien by attachment for rent due. If the former, his protection is as complete as the value of the property upon the demised premises may make it. * * * *The conclusion seems inevitable that the lien attaches for the entire term of the lease on all property of the tenant, placed upon or used on the leased premises, and subsists until all rent for the term has been paid.* The Supreme Courts of Iowa, Alabama, and Arkansas have reached the same conclusions upon similar statutes (citing cases)."

In the event, then, that the receiver had rejected the lease in question, the lessor would have been protected to the extent of the value of the property on the premises *at that time.*

The lessor would have also had, in that event, the right to recover damages against the estate of the insolvent lessee for breach of contract, and may have other remedies against the lessee. (Clark on Receivers, p. 604, Sec. 446.)

However, by reason of the act of adoption by the receiver, the lessor was precluded from pursuing these remedies. He could only wait until the receiver decided whether he would adopt or not, and upon his doing so [T. R. p. 24], the lessor had to continue performance.

Furthermore, the lessor's right to assert his lien against the property was held in abeyance during the entire time that the receiver was in possession of the premises because the receiver was not delinquent in the payment of rent. The lessor could not, therefore, assert his lien against the property prior to the time the receiver delivered possession to the purchaser. He did give constructive notice by filing his claim for rent [T. R. p. 13] that he asserted his lien, which was all he could do under the circumstances. He did this on May 2nd, 1932. [T. R. p. 13.]

The receiver was not only in an advantageous position at the time he was appointed, but continued so during the period of his occupancy.

The lessor was forced to enter into the landlord-tenant relationship with the receiver upon the latter's election to affirm the lease. It is a general principle of law that a party to a contract has the privilege of choosing the other party to the contract, but such is not the case where the receiver adopts an existing contract. The lessor entered into the lease with the lessee voluntarily. He does not do so when a receiver takes over an existing lease. His protection, however, lies in the receiver's bond, his official position as an officer of the court, his neutral attitude toward all claimants, and the fact that he owes an equal duty to all claimants to administer the affairs of the insolvent, to preserve the assets, and to make distribution of the funds according to the rights established by the

parties asserting rights thereto. A receiver represents no particular interest or class of interests. He holds for the benefit of all who will ultimately show an interest in the property. He stands no more for the creditor than the owner. (*New York, etc., Co. v. New York, etc., Co.*, 58 Fed. 268); *High on Receivers* (4th Ed.), p. 161, Sec. 138. High states the duty of the receiver to preserve existing liens as follows:

> "And where property comes into the possession of a receiver subject to pre-existing liens, it is as much his duty to preserve and protect such liens in favor of the holders thereof as to make a just distribution of the assets among the unsecured creditors (citing cases)."

See, also:

Beach on Receivers, p. 318;
Clark (2d Ed.), p. 469, Sec. 354.

Furthermore, at the time the leasehold interest was transferred [T. R. p. 34], the receiver had the power to protect himself and the interests of all the claimants to the funds, while the lessor could only stand by. He could do nothing to protect himself, but had to look to the receiver to preserve his rights. The receiver could, and should, have taken security for the faithful performance of the terms and conditions of the leasehold transferred to Schwartz, the purchaser. Such provisions are proper (*Guaranty Trust Co. v. Metropolitan Street Ry.*, 177 Fed. 925 (C. C. A. 2nd, 1910)), and customary. (See decrees cited in note 112, "Adoption and Rejection of Contracts and Leases by Receivers," *supra.*) The lessor has lost the right to assert his statutory lien against the prop-

erty itself by reason of the irresponsibility of the purchaser of the property upon the leasehold premises. The receiver could have prevented the loss to the lessor, and yet have protected the fund of the insolvent against loss to the other claimants by requiring such security from the purchaser, but he failed to do so. His failure was a breach of duty he owed to the landlord.

It is argued, however, by counsel for appellant [T. R. p. 11], that "the landlord was (by the sale) placed in no worse situation than he was in when the receiver took possession," and, further, that "there is no showing of inequitable conduct on the part of the receiver." On the contrary, we submit that the receiver was guilty of conduct here which resulted in grave injustice being done to the landlord, while the latter is entirely free from blame, and did whatever was in his power to do to preserve his lien and to assert his rights. That he was diligent in all matters was expressly found by the court. [T. R. p. 36.] The receiver not only failed to take security for the performance of the lease, but *he placed the purchaser in possession of the premises* on November 16, 1932 [T. R. p. 20], while he did not file the petition and obtain the order for the sale of the property until November 23d [T. R. p. 19], and the owner of the premises was not notified of the sale nor the change of possession until November 30, said notice being received on that date by the attorney for the appellee herein, at Los Angeles, California, a distance of 250 miles away; yet appellee's attorney-in-fact, with whom business transactions involv-

ing this property had previously been had, was living in Yuma. [T. R. p. 20.] It is stipulated in the record that the receiver had theretofore discussed matters touching appellee's interests with him, but that the change of possession and sale was made without notice of any kind. [T. R. pp. 20-21.] What protection did the landlord have during this time? It was the following Saturday night and Sunday, the 3rd and 4th days of December, that the purchaser, Schwartz, moved out all the merchandise and much of the movable fixtures used in connection with the grocery business conducted on the premises. [T. R. p. 21.]

Can it seriously be contended that there was no inequitable conduct on the part of the receiver calling for the application of equitable principles?

It is unthinkable in a court of equity that the receiver should not be held responsible as a substituted party on the lease. He entered into it voluntarily. He would be liable on contracts he, himself, as a receiver, made and entered into. *Clark on Receivers,* p. 589, Sec. 428, states that "If the receiver does adopt a contract it is a voluntary act of his own, to be performed with promptness." He says, in the same work, at page 602, section 443, that a receiver becomes liable upon the covenants because and only because of his acts in respect thereto.

In conclusion, we submit that, while the act of adoption of an existing lease does not constitute true novation because one of the essential elements of a new contract—

that of assent—is quite often absent, yet, in effect, there is a substitution of the receiver for the original lessee.

The language of the courts to the effect that the receiver "steps into the shoes" of the insolvent, the decisions that he is liable for defaults occurring *prior* to his adoption, and that he is liable thereon for the whole term, sustain the proposition of law advanced by counsel for appellee here that the receiver is, in effect, substituted for the original lessee. The proposition advanced here is consistent with the decisions of the courts that where there is no adoption of the lease by the receiver that the lessee remains liable for the payment of rent, for in such case the receiver is merely the custodian of the property and the legal relationship between the lessor and lessee is not disturbed. It is consistent, too, with the decisions of the courts that a lessee is excused from the payment of rent if the appointment of the receiver is obtained at the request of the landlord, upon the ground that such act by him constitutes an eviction and is inconsistent with the landlord-tenant relationship. Similarly, is not the adoption of a lease by the receiver inconsistent with the lessee's possession and continuing liability under the lease? Furthermore, in the instant case, it is consistent with the conduct of the receiver, in that he did not require the purchaser, Schwartz, to assume and discharge the contracts, leases, and agreements made by him or adopted by him. He, himself, was, and is, primarily liable thereon, and continues to be so liable until the end of the term.

II.

One Having a Landlord's Lien Upon the Personal Property of the Lessee Upon the Demised Premises, Is Entitled to Assert His Lien Against the Funds of His Insolvent Lessee in Custodia Legis.

(a) He Has a Statutory Right.

The statutes relied on by appellee herein to give him a preference over all other claimants against the funds in the hands of the receiver are set forth in full in this record. [T. R. pp. 17-18.]

It was held in *Murphey v. Brown, supra*, that the protection to the landlord under this statute is "as complete as the value of the property upon the demised premises may make it," and, further, "subsists until all of the rent for the term has been paid." It is a preference which arises at the time the leasehold estate is created and cannot be destroyed by the act of a receiver, and, furthermore, the landlord may assert the lien against the funds of the insolvent in the hands of the receiver. (*See Crayton Hardwood Co. v. Richardson-Warren Co., supra; Link Belt Machine Co. v. Hughes, supra.*)

In the *Fee-Crayton* case, the facts of which have been heretofore set forth, the court said:

> "This lien is a thing distinct from the primary obligation of the lessee or assignee to pay the rent, and may be asserted against the pledged property so long as it remains upon the premises, regardless of who may be primarily responsible for the rent. The lessor timely asserted her claim after the property had been taken into the hands of the court, through its receiver, and before portions at least of the lumber and mill property were sold, and before any distribution of the proceeds had been made.

"Granting that the receivers had the right to repudiate the lease, they could not destroy the lien, and such rights as were acquired by the lessor against the purchaser at the receiver's sale I think were merely additional to those which she enjoyed against the property. If the lessee, his assigns, or the owners of the property affected by the lien, could not take it off the premises or otherwise destroy the rights of the lessor without her consent, I do not see how this could be done by the receivers. To so hold would be to say that the mere filing of a bill of complaint and taking possession of the property by the receivers could have the effect of destroying an otherwise substantial right and lien under the state law. I do not think this can be done.

"The lease itself does not provide that the failure to pay any installment shall have the effect of maturing the balance of the unpaid rent; but, if judicial proceedings had not intervened, the lessor could have exacted that the security which she enjoyed continue to remain upon the premises until the discharge of all the obligations as they matured under the contract. The liquidation by the courts of the affairs of the corporation and the converting of its assets to money has made this impossible, and I think the lessor is entitled to be paid the amount of her matured claim in full; but as to that to become due the same should be discounted at a reasonable rate, say, 6 per cent. per annum."

In the instant case, as has been heretofore pointed out, the lessor cannot assert his lien *against the property* by reason of the negligent and inequitable conduct on the part of the receiver, but the lien is not lost to him. He

may satisfy it out of the funds in the hands of the receiver.

The decision of the court in *Link Belt Machine Co. v. Hughes, supra,* seems particularly applicable to the situation presented here. In that case the rent was not in arrears when the receiver was appointed. He paid the first month's rent, under the lease, and the next two months' rent was paid by order of the court. Thereafter, upon order of the court, the property was sold for $2,218. Upon the receiver's report of the sale being made, the lessor filed a supplemental petition, claiming a lien upon the proceeds for the rent due to date, which amounted to $4,800. under the lease by that time. It was held that, inasmuch as there had been an adoption of an existing contract which reserved a lien, the landlord was entitled to a first lien upon the proceeds of the sale. The question arose as to whether the rent found due under the lease, the money borrowed by the receiver to conduct the business, receiver's fees, and other expenses, should not be pro rated. The court said, in this connection:

> "We are not called upon to determine that question in this case. The lease in question expressly gave to appellee a lien upon all the property of the receiver for rent which should remain due and unpaid. The parties had a right to enter into a contract of this nature, and it was binding upon the lessor and lessee. When the receiver took possession under the order of the court, the lease was not changed. The court having ordered the receiver to occupy the leased premises under the lease the receiver took the property subject to the same terms and conditions as it was held by his insolvent. If appellee had a lien against the property

for rent he also had a lien against the property after it thus passed into the hands of the receiver * * * and in this case, *where the property was sold by the receiver under an order of the court, preserving whatever rights existed in favor of appellee, his lien continued and was transferred to the proceeds arising from the sale of such property, and was prior to the claims of the other creditors or other costs.* In the absence of such a lien reserved upon the property in the lease for the payment of unpaid rent a different question might arise as to the pro rating of the purchase money between a landlord and those entitled to the costs of administration.

"Appellee having the right to his lien upon the purchase money arising from the sale of the property upon which he had reserved his lien for unpaid rent, and also to receive from the receiver the same rent provided for in the lease, it is unnecessary to discuss the other questions raised."

The *Link Belt* case answers the question raised here as to the landlord's right to transfer his lien to the funds in *custodia legis*. The facts are strikingly similar to the facts in the instant case, and the decision is determinative of the rights of the litigants here.

However, we will answer the contentions raised by appellant in this connection.

When the property is in *custodia legis,* the landlord may assert his lien against the fund (as opposed to the proceeds derived from the sale) in the hands of the receiver. (See note, 9 *A. L. R.* 330, at 333.) Appellant admits this. (Brief of Appellant p. 11.) He admits that if the receiver is bound for the rent of the full term of the lease that he "could, of course, discharge by apply-

ing thereto any funds in his hands belonging to the estate, including proceeds from the sale." We maintain that the lessor is entitled to assert his preference, to the full value of the property placed upon and used by the tenant upon the premises, and that he may assert his claim as a general creditor against any funds in the hands of the receiver, for any balance due him over and above the value of the preference created by the lien. He is not limited, in his preference, to the amount realized by the sale, for that sum is not the measure of the landlord's preference, but rather, it is to be measured by the value of the property upon the premises, or used thereon by the tenant. (*Murphey v. Brown, supra.*)

Counsel for appellant contends that since the sale was made "subject to the lien", appellee still has his right to proceed against the property (if he can find it), and that the lien is not transferred to the proceeds of the sale. He states the rule (at page 12 of his brief): "But if the property of the tenant is taken into the custody of the law and converted into money, the lien will attach to such proceeds." (35 C. J. 503, par. 1483.) Counsel for appellee has also examined carefully the five cases supporting the text, as well as other cases applicable to this situation, some of which will be hereinafter discussed, and he finds that in none of the cases there cited, with the exception of *Lemay v. Johnson* (1870), 35 Ark. 225, was there any mention of the question as to whether the sale was made free of or subject to encumbrances. Counsel for appellant takes the position that if the sale is not made free of the lien that it is made subject thereto, although not expressly so stated. In the *Lemay* case, a sale of perishable personal property was made by the receiver,

and the court held that the landlord was entitled to assert his lien against the funds in *custodia legis,* saying that:

> "There is no proof that it brought less than its full value, nor was there any order that it should be sold, subject to prior liens."

thus implying that if it was not sold "subject" that it was sold free of liens. Since the order here did not expressly state that it was not made free of liens, we do not concede the point that it was therefore made subject thereto.

Other cases, in addition to those cited in *Corpus Juris, supra,* bearing on this point are *Robinson v. McCay* (1829), 8 Mart. N. S. (La.) 106, wherein it was held that where the statute gives a landlord a preference for rent as against property on the demised premises or which has been removed therefrom if exercised within a specified time after removal, that such preference extends to the proceeds of a tenant's goods removed and sold by the personal representative or curator of his estate, and under similar provisions in the Porto Rico Civil Code, it has been held that the landlord's preference or lien follows the proceeds of the tenant's goods and crops in the hands of his receiver. *Welch & Co. v. Central San Cristobal* (1914), 7 Porto Rico Fed. Rep. 205. In that case the receiver had adopted a contract which reserved a lien. The Court said:

> "All valid liens created by law are recognized by the Federal courts, and, in a proper case as to citizenship, must be enforced there.
>
> "This is not only true as between persons, but in case of receivership also. It is true that the receiver has the option to adopt contracts or to repudiate onerous preexisting contracts, as has been held by

this court in a number of instances. But where a contract has been adopted, any lien that goes with the contract or security for the contract is itself adopted. A receiver's possession is subject to all valid existing liens upon the property at the time of his appointment, and it is his duty to preserve and protect such liens. High, Receivers, pp. 159-161. To the same effect is Beach on Receivers, p. 318. The receiver is an officer of the court, and the funds or property in his hands is in *custodia legis* for the benefit of whoever may finally establish title thereto. High, Receivers, p. 3."

Furthermore, it is apparent that counsel for appellant was confused in his own mind as to the sale being free of or subject to existing liens, for he argues and quotes to the effect (pp. 14-15 of his brief) that the receiver ordinarily has no power to sell free from encumbrances, but that power may be given, and such sales made, and in that event the lien is transferred to the proceeds. But since he contends that the sale was made *subject* to existing liens, we fail to see how the quoted language as to the power of a court to sell free of liens under certain circumstances is applicable to the situation presented here.

(b) He Has an Equitable Right to Assert His Lien Against the Funds in Custodia Legis.

Counsel admits (at page 11 of his brief) that if there was any inequitable conduct on the part of the receiver, or if the appellee had lost his lien upon the property "by reason of anything the receiver had done in the premises", there might be a basis for transferring the lien to the proceeds.

It is a familiar principle of equity that the law respects form less than substance. Counsel would give appellee a mere husk—a right to assert his lien against the property—and deny him the kernel—the right to assert it against the fund—on the ground that, as he asserts, the receiver has done no wrong.

This is a situation calling for the application of the powers of equity to relieve against an injustice. The landlord was diligent in all things concerning the preservation of his lien. This was expressly found to be true by the trial court. [T. R. p. 36.] It is a familiar maxim that "Equity aids the vigilant and not those who sleep upon their rights." We have shown that the landlord stands at a disadvantage during receivership proceedings. On the other hand, as has been hereinabove pointed out, the receiver, standing in a position of advantage, and having a duty to this landlord to preserve his lien, equal with his duty to the other creditors to safeguard their rights, utterly failed to protect the landlord. It had been his custom to discuss matters involving the business he was operating upon the premises with the appellee and his agent. [T. R. p. 20.] He caused the purchaser to be placed in possession of the premises on November 16th, and did not petition the court for an order, and did not obtain the order authorizing the sale until November 23d, and did not give notice to the appellee herein until November 30th, and then gave it to appellee's attorney at Los Angeles, California. The attorney-in-fact of appellee herein, with whom he usually discussed matters and transacted business, was living at the time at Yuma, where the premises are located. [T. R. p. 20.] He owed a

duty to the landlord to preserve his lien, and we submit that he failed to discharge that duty.

The receiver stood in a position where he could, and should, have taken security for the performance of the terms and conditions of the leasehold interest transferred to Schwartz, and particularly so in this case, inasmuch as the landlord had given constructive notice by filing his claim for rent under the statutory landlord's lien law of Arizona months before. [T. R. p. 13.]

Equity says that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Surely, this is a situation calling for the application of this rule.

Equity powers are broad and are applied to varying situations in order to relieve an innocent party from an injustice. If the legal remedy fails, equity steps in, for it is unthinkable that there should be a wrong without a remedy.

It is respectfully submitted that the decree of the lower court was correct, and should be affirmed.

Respectfully submitted,

WARREN E. LIBBY,
Attorney for Appellee.

No. 7322. 17

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Leo A. Madden, Ancillary Receiver of Piggly Wiggly Yuma Company, a corporation,

Appellant,

vs.

Morris LaCofske,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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APPELLEE'S PETITION FOR REHEARING.

To the Honorable United States Circuit Court of Appeals, for the Ninth Circuit:

Comes now the above named appellee, Morris LaCofske, and after decision adverse to him in the above entitled cause, petitions this Honorable Court for a rehearing herein, and for grounds therefor, assigns the following:

I.

That the court in its present opinion has not adhered to the true rule of law that a chancery receiver who adopts or affirms the lease of his insolvent is liable to the

lessor thereon for the entire term, and upon each and every covenant contained therein.

II.

That the court in its present opinion has not given any effect to the Receiver's act of adopting the lease and is not recognizing any distinction or difference in the liability of such a Receiver, (a) when he is first appointed and has qualified, (b) when he has taken possession of the leased property, and (c) when he has adopted and affirmed the lease of his insolvent.

III.

That the court in its present opinion, by the recognition of the precedents it cites therein, has acknowledged the correct rule (a) that the Receiver when he is first appointed is under no liability to the landlord, and (b) that when he has taken possession he is liable for the rental so long as he is in possession,—the same as any assignee who has not agreed to the lease,—but has incorrectly (c) held the Receiver who adopts the lease to the same liability as one who merely takes possession, whereas the Receiver who adopts should be and is held under the terms of the lease the same as an assignee who agrees to be bound by the lease, for otherwise great injustice is worked upon the lessor.

IV.

That the court has erred in its present decree that a Receiver who adopts and affirms the lease of his insolvent

is not liable to the lessor thereon for the entire term solely upon the authority of opinions and rulings announced in cases where there was no adoption or affirmation.

V.

That the court in its present decree has committed error in holding that such Receiver who adopts and affirms such a lease is not liable to the lessor thereon for the entire term, without assigning any precedent or authority therefor, or assigning any reason or equity as to why such rule should be applied.

VI.

That the court by its present decree in holding such Receiver not liable under the lease for the full term, after his adoption and affirmation thereof, has adopted and applied for the first time a rule which is unreasonable and inequitable and is a dangerous precedent.

VII.

That the court by its present decree has committed error in not assigning any reason why a Receiver who has adopted his insolvent's lease is not liable for the full term thereof for future guidance, because the instant case is the first time that an Appellate Court has been called upon to rule upon such Receiver's liability after adoption and affirmation of the lease.

VIII.

That the court has committed error in holding that such Receiver after such adoption and affirmation may escape

future liability under the lease by assigning it and delivering possession to the assignee; *i. e.,* this court of equity in its opinion has said that its Receiver may not directly escape future liability and evade the landlord's lien by abandoning the premises after he has adopted the lease, but may do so indirectly by assigning to a straw man, thereby enabling the straw man to do indirectly what it would not permit its Receiver to do directly. We do not believe the court intended this result.

IX.

That the court by its present decree has committed error in permitting the Receiver to escape such future liability, thereby working gross injustice upon the landlord in not only depriving him of his landlord's lien by permitting the Receiver's assignment to an irresponsible person without notice to the lessor, but also in failing to impress such landlord's lien upon the moneys paid to the Receiver for the assignment.

X.

That the court's present decree is inequitable in not giving the landlord judgment against the Receiver for the amount of rent due under the terms of the lease adopted and affirmed by the Receiver.

ARGUMENT.

The instant case so far as counsel for the Appellee have been able to discover is the first cause presented to an appellate tribunal involving directly the liability of a Receiver under his insolvent's lease after he has adopted and affirmed the lease. Under such circumstances, we feel that the court's conclusion should either be based upon good authority or be supported by reasoning derived from the application of purely equitable principles. We feel that the present decision is, so far as the opinion discloses, unsupported by either such authority or such reasoning.

The reasons and authorities for each and all of the foregoing grounds for their petition for rehearing are already set forth in appellee's briefs on file herein, excepting that most of the decisions cited in the opinion herein were not cited by either the appellant or appellee in either the briefs or arguments herein, and for that reason could not be analyzed or commented upon by appellee previous to this time. For that reason, in order to show that they are not authority for the liability of a Receiver after his adoption of his insolvent's lease, we now respectfully call the court's attention to each and all of the authorities cited in the opinion herein, as follows:

The first case relied upon and quoted from is *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 58 Fed. 257. The opinion in that case was rendered orally upon a petition of the lessor asking for a decree that the receiver be required to pay rental, as stipulated in the lease, for the leased lines during the time of their operation by the receiver, which petition was made after the court had entered its decree that the Receiver not adopt the lease

but surrender possession to the lessor. No ruling was called for, or made, concerning, nor could the language of the court's opinion apply to, the liability of a receiver after he had adopted the lease.

In the next case cited in the opinion herein of *Carswell v. Farmers' Loan & Trust Co.,* 74 Fed. 88, the opinion states, "it is clearly established that the receiver at no time had the slightest intention of adopting the lease", so that the issue could not possibly involve liability of a receiver after he had adopted the lease.

The third case cited in the opinion herein of *Mercantile Trust Co. v. Farmers' Loan & Trust Co.,* 81 Fed. 254, discloses that the opinion was rendered upon an appeal from an order denying the petition of the receivers for leave to renounce the lease in question, which order directed the receivers to pay the rent stipulated in the lease during the receivership from the income or proceeds of the property described in the lease. The Court of Appeals held this a proper ruling, *thereby constituting the opinion authority for appellee's contention herein,* rather than for the conclusion the court has reached therein.

In the next case cited in the opinion, that of *Dayton Hydraulic Co. v. Felsenthall,* 116 Fed. 961 (App. Br. p. 7), the lower court's ruling was based squarely upon the fact that the receiver had not adopted the lease and the Court of Appeals held that prior to such adoption the chancery receiver is not an assignee of the term of the lease. It is no authority for a holding that the receiver is not an assignee after his adoption of the lease.

In the case of *Pennsylvania Steel Co. v. New York City Ry. Co.,* 198 Fed. 721, the Court of Appeal's ruling was

that the receiver does not adopt the lease by operating the lines during the trial period. Therefore, the decision is not authority for the liability of the receiver after he has adopted the lease.

The case of *Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid T. Co.*, 6 Fed. (2d) 547 (App. Br. p. 18), discloses affirmatively in the language quoted therefrom at page 5 of the opinion herein, where it says that the receiver "does not *by possession* become assignee of the term", that the court is considering only the liability of the receiver after he has taken possession of the leased property and before he has adopted or affirmed the lease. Consequently, the decision has nothing to say about the liability of the receiver, nor can it be taken as authority for such liability, after his adoption and affirmation of the lease.

The question of the authority of *Tiffany on Landlord and Tenant* has already been disposed of in appellee's brief, pages 13 to 16.

The entire misconception of the proper rule of law in this entire matter is traceable to the opinion in the case of *United States Trust Co. v. Wabash Railway*, 150 U. S. 287, containing the language quoted in the opinion herein at page 6. As already observed in appellee's brief herein (pages 7, 12, 13), three points must be noted concerning this decision:

1. The opinion was rendered upon a claim of the lessor for rent stipulated in the lease made after the time when the trial court had ordered the receiver not to affirm the lease and had directed him to surrender the leased property to the lessor when such possession was requested, conse-

quently, no decision as to the receiver's liability after adopting the lease could be involved or decided.

2. The decisions cited in that case by Honorable Justice Brown as his authority for his statement made as quoted in the opinion herein support only the first sentence of the quotation and are not any authority whatsoever for the last sentence which must be regarded purely as *dictum* as well as not supported by precedent as might be assumed from the context. This sentence used by Justice Brown without authority to support it, and made as a preliminary observation is the one relied upon for the court's conclusion herein. It is the only judicial expression we can find upon the subject, and because it was not supported by authority it should not be accepted without strong reasoning and equity being in its favor. We are unable to find either and the opinion herein has not helped us in that respect.

3. The conclusions of the court in the *Wabash* case were reached purely upon equitable considerations and not upon the rule of law quoted and relied upon by the opinion herein, and consequently, cannot be accepted as precedent for the conclusion here reached.

The case of *American Brake Shoe & Foundry Co. v. New York Rys. Co.,* 282 Fed. 523, presents an issue arising upon an application of the lessor for an order that the Receiver pay rent and taxes as stipulated in the lease during the period he was in possession, which application was made following an order of the lower court that the receiver not adopt the lease and after the leased property had been actually turned back to the lessor (see page 526). Furthermore, the expressions of *dictum* upon this

subject as set forth therein were also made on the sole authority and Justice Brown's above quoted language in the *Wabash* case.

In the second case of *Pennsylvania Steel Co. v. New York City Ry. Co.,* 219 Fed. 939, the issue arose on a claim made by the lessor for rents as stipulated in the lease for the period the receiver had operated the lines, which operation was "acquiesced in" by the lessor as a period of "experimental operation" and was a period during which "the receivers operated these lines for the benefit of the lessors", and which lines were turned back to the lessors at the end of that period. Consequently, no question of the liability of the receiver after his adoption of the leases could be involved.

The opinion in the case of *General Finance Corporation v. New York State Rys.,* 54 Fed. (2d) 1008, was written upon an appeal from an order of the lower court granting the receiver's petition "for an order disallowing and disaffirming" the lease, and consequently could not possibly involve the receiver's liability after an adoption had taken place.

The opinion herein relies upon the authority of *Lewis on The Law of Leases of Real Property,* pages 35, 493, 494, a check of which discloses that the text at those points is merely the verbatim quotation of the syllabi in the published volume reporting the case of *American Brake Shoe & Foundry Co. v. New York Rys. Co., supra.* Consequently, this text can be no greater authority than the *American Brake Shoe & Foundry Co.* case which has already been disposed of and which is cited as the authority for the text.

The last case relied upon by the opinion herein upon this branch of the law is that of *Northwestern Mut. Life Ins. Co. v. Security S. & T. Co.,* 261 Fed. 575. This case is not even a receivership case and, consequently, cannot involve the liability of a receiver after the time when he has adopted a lease.

In conclusion, we feel that the opinion herein has worked great injustice upon the landlord and has not done equity. We say this because the decree which would flow from this opinion as the decree of a court of equity will necessarily countenance the act of its receiver accomplishing an injustice indirectly by means of an assignment of the lease, which it would not allow the Receiver himself to do directly by his own act. There is no escape from the observation that the landlord is in a worse position by the adoption and assignment by the Receiver, for not only is the landlord deprived of all control over his property, including all opportunity to obtain a new tenant while the Receiver, or his assignee, holds the property and gives no definite time of termination, but also he is deprived of his lien, which deprivation a court of equity would not permit through its Receiver.

Wherefore, appellee respectfully submits that a rehearing should be granted herein upon the authority already cited in his briefs filed herein.

Respectfully submitted,

WARREN E. LIBBY,
Attorney for Appellee.

Certificate of Counsel.

I, Warren E. Libby, counsel for the appellee herein, hereby certify that in my judgment the foregoing petition for rehearing in the above entitled case is well founded and that it is not interposed for delay.

WARREN E. LIBBY,

Attorney for Appellee.